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UNIVERSITY OF ILLINOIS BULLETIN

# HOME RULE IN ILLINOIS

*Final Report, Background Papers, and Speeches*

ASSEMBLY ON HOME RULE IN ILLINOIS

*Edited by Stephanie Cole and  
Samuel K. Gove*

THE INSTITUTE OF GOVERNMENT AND PUBLIC AFFAIRS  
UNIVERSITY OF ILLINOIS



ILLINOIS HISTORICAL SURVEY







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# HOME RULE IN ILLINOIS

*Final Report, Background Papers, and Speeches*

**ASSEMBLY ON HOME RULE IN ILLINOIS**

*Harrison House, Lake Bluff, Illinois*

*April 5-7, 1973*

*Edited by Stephanie Cole and Samuel K. Gove*

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**THE INSTITUTE OF GOVERNMENT AND PUBLIC AFFAIRS**

**UNIVERSITY OF ILLINOIS**

**OCTOBER 1973**



## FOREWORD

Illinois is the last large industrial state to adopt "home rule." The new Illinois Constitution, effective July 1, 1971, includes a local government article changing state-local relations characterized by tight state government control over its localities to a relationship where the localities have great freedom. In fact, the Illinois constitutional provision for home rule has been described as one of the most liberal found in any state constitution.

The Institute of Government and Public Affairs, long-time participant-observer in significant political and governmental developments in Illinois, determined this change in state-local relations had such strong potential impact on the state that it was worthy of close study. For this purpose, the Illinois Home Rule Clearinghouse and Policy Analysis Project was organized. As part of the project, the Institute's annual assembly, first held in 1958, was in 1973 devoted to the issue of home rule.

As University of Illinois President John E. Corbally Jr. said in a statement read at the opening of the assembly, "This conference will explore 'home rule' — a concept which implies local authority and which requires local responsibility. The concept is crucial to our society and is badly in need of reexamination."

This volume is the report of the Assembly on Home Rule. It includes the assembly report, the speeches, list of participants, and background papers prepared before the conference. The background paper authors were not limited in the expression of their views and interpretations, which therefore are their own. In some cases, the authors revised their papers significantly after the assembly to include important post-assembly developments. John Parkhurst prepared a new paper to replace an article that he had published elsewhere immediately after the adjournment of the Sixth Illinois Constitutional Convention.

We want to thank the paper writers, the participants, the home rule project advisory group, and the Institute staff, all of whom contributed to the success of the assembly. Special credit should go to Stephanie Cole, the home rule project director. And finally we want to thank the state Office of Planning and Analysis in Springfield for the financial support of the home rule project, including the assembly, through a comprehensive planning grant from the U.S. Department of Housing and Urban Development.

SAMUEL K. GOVE

Director, Institute of Government  
and Public Affairs



DAVID C. BAUM

1934-1973

*David C. Baum, professor of law at the University of Illinois at Urbana-Champaign, died March 2, 1973, after a brief illness. Professor Baum was an active and valuable member of the advisory group to the Illinois Home Rule Clearinghouse and Policy Analysis Project; his thoughtful and imaginative guidance are missed. Professor Rubin G. Cohn spoke the following words at a memorial service and at the Illinois Assembly on Home Rule:*

It is surely not the length of years that measures the worth of a man. David Baum's contributions to teaching, scholarship, government, public service, community, and family, all within the span of less than four decades, incontestably verify this truism.

I will touch briefly upon only two of his major achievements. In 1970, David and I served the Sixth Illinois Constitutional Convention in similar capacities—he as counsel for the Local Government Committee and I as counsel for the Judiciary Committee. The product of the convention is now the basic charter of the state. Among scholars, there is absolute consensus that the local government article of the new constitution, particularly its provisions establishing principles of municipal home rule, embodies the most innovative, constructive, and far-reaching reforms in the state's history. David was a major architect of that article. His two most recent publications analyzing its provisions are and will remain among the most definitive and influential of research sources for judges, legislators, lawyers, and students of government. Those constitutional provisions now and for a long time will constitute an exciting new model for other states to ponder, analyze, emulate, and adjust.

Standing alone, David's contributions in this area have earned him recognition and rank among the nation's foremost scholars in local government law. They do not stand alone, however. Serving with a joint committee of the Illinois State and Chicago bar associations, David played a major role in drafting, and in securing legislative enactment in Illinois, of a comprehensive law detailing the respective areas of immunity and liability of local governments and local governmental officials for injuries to private citizens. The law brought a sense of enlightened order into what had been a chaotic wilderness of conflicting and ambiguous principles. Here, too, his writings

have helped shape the course of judicial interpretation and continued legislative policy.

There is much more, but in the few remaining moments I propose to speak of David in a more personal view. By conventional criteria, David was not a religious man. His commitment was not to the institution, the organization, the structured, ritualistic forms by which most persons establish a religious identity. Yet he was, indeed, a deeply religious person in the most significant sense of that term. As a youngster, barely in his teens, he had read Hillel's famous ethical and moral, and thus religious, pronouncement. Hillel, the wise and gentle Hebrew philosopher, scholar, and teacher, contemporary of Jesus, said: "If I am not for myself, who is for me? And if I am for myself alone, what then am I? And if not now, when?" During a service in a youth group, David spoke on that theme. It haunted and possessed him. Then and there, he resolved that it would serve as his life's credo. He and Alice, after their marriage, made a conscious, deliberate pledge that their lives would be lived by Hillel's maxim. Know yourself, your worth, your soul, your conscience; know the meaning of your life; know your identity and purpose in the universe, your capacity for truth, for love and goodness; then having achieved this threshold of wisdom, universalize it; extend it in word and deed, in thought and action to your fellow man; not when convenient or comfortable, but now, today, every day, every moment of your life. And so he lived his brief life in simple, graceful, and eloquent loyalty to this commitment.

David was born in the year that I received my law degree. Our paths crossed and merged in 1963 when he joined the faculty. One complete generation lay between us. Yet such was the harmony of his nature that it transcended barriers of age, habit, and tradition. We were friends the moment we became colleagues. And so it was with David and all his colleagues, as it was with the staff and students of the College of Law. He was a very *human* human being.

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*REPORT OF THE ASSEMBLY*

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## REPORT OF THE ASSEMBLY

Participants in the Illinois Assembly on Home Rule meeting at Harrison House, Lake Bluff, Illinois, April 5-7, 1973, approved this summary of their findings at the conclusion of their discussions. The findings of the assembly relate only to those matters specifically discussed and are not put forward as a comprehensive treatment of the issues which arise from home rule. Since there were dissents on particular points, it should not be assumed that every participant subscribed to every detail of the statements contained herein.

### I

The grant of home rule powers contained in the 1970 Illinois Constitution was extremely significant for the state. The assembly was convened to consider the challenge and the opportunity created by the new home rule provisions, as well as related sections of the local government article.

Home rule is an important new constitutional principle. Its full potential will be realized as local governments assume their new responsibilities and powers, the state legislature clarifies its new relationships to local governments, and the courts refine the new distribution of powers.

Home rule is not a panacea for all the problems of modern society, but it is an important tool for general local governments to use in solving some of their most difficult problems more imaginatively and effectively.

### II

Home rule cannot reach its full potential unless state and local legislators, executives, and the general public are knowledgeable about the content and meaning of this new concept. Public and private bodies should devote time, money, and effort to wide-

range educational and informational programs. In addition to informational efforts for the general public, groups possessing legal expertise should prepare and widely distribute sample ordinances, other governmental documents, and manuals for use by home rule units, including a manual for the use of municipalities and counties contemplating home rule referenda. It is hoped that the presence and availability of well-drafted model ordinances and other material will encourage a reasonable degree of voluntary uniformity of governmental action throughout the state, where such uniformity is desirable for the solution of common problems. The informational efforts should also include meetings at which state and local officials can be briefed on the history and current trend of home rule. Home rule units should continue to expand current contacts and the exchange of information which presently exists among them. Educational institutions at all levels should teach about and encourage scholarly efforts on home rule and intergovernmental relations generally.

### III

There is a basic need for members of the General Assembly to be made aware of the complex issues and policy alternatives involved with the concept of home rule as defined by the 1970 Illinois Constitution. In addition, the General Assembly must establish clearly defined procedures and ground rules to be followed when dealing with home rule matters. In its enactment of proposed legislation, the General Assembly should exercise more precision in describing what home rule powers or functions the legislation intends to deny, limit, or make exclusive to the state by specifically so stating and by indicating the constitutional majority needed for passage. The assembly recommends that the members of the legislature be provided with a handbook on home rule which reviews the basic legal questions and issues involved and which describes the various policy alternatives open to the General Assembly. The assembly further recommends that seminars on home rule be held to acquaint members of the legislature with the complex issues involved in Illinois's unique system of

home rule. Finally, the assembly recommends that the General Assembly establish a procedure for the regular study and review of the great variety of complex home rule questions by establishing a home rule study commission, creating a "little ACIR" (modeled after the federal Advisory Commission on Intergovernmental Relations), or assigning the task of study and review to an existing legislative commission.

#### IV

The assembly recognizes that there are areas of legitimate statewide concern which would justify preemption, limitation, denial, or concurrent exercise of local governmental power. However, the state should not act in any such areas in the absence of a compelling state need.

#### V

The assembly finds that the judicial response to local governmental home rule enactments is generally favorable to the principle of local autonomy but that a number of basic and fundamental issues have not yet been presented to or resolved by the Illinois Supreme Court.

The assembly further finds that the constitutional home rule concepts so profoundly alter traditional principles of state-local relationships that the judicial resolution of home rule issues, when presented in the context of limited and narrow problems, may result in the formulation of broad principles not in harmony with the perspectives of the new constitutional philosophy. Accordingly, it would be eminently desirable for the supreme court, through its annual judicial conference and on a continuing basis, to conduct an in-depth study of the intellectual, political, economic, and other relevant aspects of home rule. This recommendation would be presumptuous were it not for the fact that the unique Illinois home rule provisions introduce novel and profound principles involving complex issues of law and policy which will test the wisdom and ingenuity of the court for years to come. The development of a logical and sound jurisprudence in this area will be extremely difficult at best. This recommendation

is designed to assist the courts in meeting the challenge of formulating a rational policy which will most effectively reflect the new principles.

## **VI**

There is a need for the state government to study the role and needs of counties. The study should be designed to: *a.* provide encouragement to counties to make use of the full scope of their new powers, including the power to acquire home rule status; *b.* recommend ways to strengthen county government administration in order to help bridge the gap between present structures and the county executive form of government; *c.* recommend ways to involve the community and county officials in educational efforts prior to home rule referenda; and *d.* recommend legislation necessary to facilitate the above, including procedural improvements to the County Executive Act.

## **VII**

The assembly recommends that the General Assembly authorize that recodifications of the Illinois Municipal Code and the Counties Act be drafted. Such recodifications should include legislation separately applicable to home rule and non-home rule units.

## **VIII**

The assembly endorses the initial approach of municipalities and Cook County in carefully implementing their home rule powers while the parameters of home rule are being more precisely defined.

## **IX**

Home rule by itself cannot solve problems of governmental reorganization and reduction in the number of units of local government, but home rule units are more easily able to assume the functions of other governmental units than are non-home rule units. A home rule unit has great difficulty in assuming functions of other units of local government, however, when the boundaries of such units do not coincide with those of the home rule unit.

The assembly recommends that the General Assembly alleviate this difficulty by addressing itself to such problems as the transfer of assets and debts, procedures for boundary adjustments, and such implementation, if any, as the courts may find necessary to carry out the constitutional provisions for special service area taxation.

**x**

There are serious social and economic problems, including problems of land use, environmental protection, and equality of opportunity, which cannot be solved by individual home rule units acting alone. The assembly recommends that the state provide positive incentives to units of local government encouraging their utilization of home rule powers and the constitutional provisions for intergovernmental cooperation toward the solution of regional problems and the provision of areawide services.

**xi**

The assembly recognizes that home rule units have additional revenue authority under the new constitution, particularly with respect to local excise taxes, and realizes that this power may be utilized to help finance essential services without disruptive economic effects. The assembly also realizes, however, that the added taxing powers granted home rule units are not necessarily adequate to their needs. Moreover, the taxing powers of home rule units, and indeed of all local governments, must be related to the total fiscal structure of the state, because it is the state government which can utilize more broadly based and equitable taxes.





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*BACKGROUND PAPERS*

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## ILLINOIS HOME RULE IN HISTORICAL PERSPECTIVE

STEPHANIE COLE

Illinois is a state with a tradition of strong state control over local units of government. The provisions for home rule contained in the Illinois Constitution of 1970 represent a dramatic reversal in state-local relationships, giving semiautonomous status to the larger municipalities, smaller municipalities which vote to adopt home rule, and counties with elected chief executive officers.

This paper presents a short history of the home rule movement in the United States as it relates to the pre-1970 situation in Illinois. The state's home rule provisions as they emerged from the 1969-70 constitutional convention are then compared with provisions in the constitutions of selected other states and with model home rule provisions, thus placing home rule in Illinois in a national context. Constitutional provisions for home rule vary widely from state to state. Factors influencing the form of home rule and the style of its application in each state include the traditional degree of autonomy exercised by local units of government, the extent of legislative control over local affairs, and the trend of judicial interpretations of state-local conflicts. "The issue of the constitutional framework for the legal division of power between the state and its localities resolves itself into a choice of the best approach to meet the needs and traditions of a particular state."<sup>1</sup>

### THE STATE AND ITS LOCALITIES

Local governments in this country are often said to be creatures of the state, although in the pre-Revolutionary period local autonomy was the rule. Colonial assemblies established the precedent for state control over local governments by incorporating small existing rural communities and by creating counties and townships to carry out administrative functions. The states continued to create and regulate units of local government after the Revolution, but a fair degree of local autonomy remained for almost two centuries.

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<sup>1</sup> Edward M. Kresky, "Local Government," in *Salient Issues of Constitutional Revision* (New York: National Municipal League, 1961), p. 159.

There is no necessary inconsistency between local autonomy and legislative supremacy over units of local government. As pointed out by the Chicago Home Rule Commission in 1954, the very establishment of a city by the state implies the necessary grant of some powers of self-government to the city. Thus, before the adoption of home rule in Illinois, municipalities exercised a certain degree of self-rule by their choice among optional forms of government. This is still the situation for non-home rule municipalities.

A state legislature may choose not simply to permit but to encourage local autonomy. This was the case in the immediate post-Revolutionary period. It was not until the latter part of the nineteenth century that state legislatures began to control local powers and functions closely. Accelerated urbanization and influxes of new immigrants, accompanied by demands for public services, some created by the new technology, led to increased governmental activity.

New local units — towns, cities, and villages — were incorporated by the legislatures. State statutes prescribed municipal powers and functions as well as the form of government of each local unit. The most minute details of local government operation became legislative concerns. A pattern of annual pilgrimages to state capitols by local officials petitioning for special enabling legislation on purely local matters became established. Often, officials from the larger municipalities did not find sympathetic listeners among generally rurally oriented legislators.

Legislative supremacy and the dependent status of local government were affirmed by judicial opinion. The best-known statement of this position was made by Justice John F. Dillon of the Iowa Supreme Court. The following passage from Dillon's *A Treatise on the Law of Municipal Corporations* is known as Dillon's Rule:

It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation . . . not simply convenient but indispensable.<sup>2</sup>

A corollary of this position is the narrow interpretation of statutory grants of power to local government. As Dillon noted, "Any fair, reasonable, substantial doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied." Judicial decisions in Illinois, as in other states, relied upon Dillon's Rule for the resolution of state-local disputes, and rulings were generally in favor of the state.

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<sup>2</sup> John F. Dillon, *A Treatise on the Law of Municipal Corporations*, 5th ed. (Boston: Little, Brown, 1911), vol. 1, sec. 237. Emphasis omitted.

## LIMITATIONS ON LOCAL GOVERNMENT

One of the means by which municipal reformers attempted to restrict legislative power during the late nineteenth century was constitutional prohibitions against special or local legislation. The Illinois experience with such a prohibition is an example of the ineffectiveness of this method in altering the state-local balance of power.

The 1870 Illinois Constitution declared that so far as possible only general laws equally applicable to all municipalities were to be enacted.<sup>3</sup> The General Assembly evaded the intent of this restriction in several ways. Through the device of classification by population, numerous statutes were applicable only to "cities over 500,000 population," which meant Chicago, the sole municipality in the state with a population over 500,000. These statutes were generally upheld by the courts as long as they appeared reasonable for the type of classification involved.

The state legislature also created many special purpose local governmental units which by their responsibility for various functions limit the role of general purpose local units. At least thirty-two kinds of special districts operate in Illinois, including school districts (accounting for 1,177 of the 3,584 special districts in existence in the state in 1972),<sup>4</sup> hospital districts, park districts, and mosquito abatement districts. Often the boundaries of the special districts bear little or no resemblance to existing municipal and county boundary lines. These districts may be created, changed, or eliminated by the General Assembly. Recognition of the problems caused by the complexity and multiplicity of special districts led the framers of Alaska's constitution (1959) to declare that the purpose of the local government article was to provide maximum self-government with a minimum number of local governmental units.<sup>5</sup>

Another way in which the Illinois legislature attempted to circumvent the ban on special legislation was by a 1904 constitutional amendment applicable only to the city of Chicago.<sup>6</sup> Known as the Chicago little charter, this amendment was intended to provide some home rule powers for the city. The state legislature was given authority to grant powers to Chicago, subject to approval by the city's voters. The establishment of the Municipal Court in Chicago, various changes in the city's governmental organization, and the granting of jurisdiction to the city over certain public utilities were the only changes made under the 1904 amendment. No real home rule was

<sup>3</sup> Art. IV, sec. 22.

<sup>4</sup> U.S., Bureau of the Census, *Census of Governments, 1972, Volume 1, Governmental Organization* (Washington, D.C.: GPO, 1973), p. 353.

<sup>5</sup> Art. X, sec. 1.

<sup>6</sup> 1870 Ill. Const., art. IV, sec. 34.

gained for Chicago because under the terms of the amendment all initiative was in the hands of the General Assembly.

### HOME RULE ADOPTION

To restrict legislative power, municipal reformers also advocated home rule. They argued that local self-rule could prevent legislative interference in local affairs and lead to flexible, responsive municipal governments. The first home rule provisions were in the form of state statutes. In 1851 Iowa adopted what has come to be known as legislative home rule.<sup>7</sup> Legislative home rule is difficult to identify; estimates of the number of states in which it exists range from five to ten. In some of these states constitutional home rule is also in effect.

The first state to grant home rule by constitutional means was Missouri, which in 1875 gave any city with more than 100,000 inhabitants the right to frame and adopt its own charter "consistent with and subject to the Constitution and Laws of the state."<sup>8</sup> Only St. Louis took advantage of this provision initially. In 1889 Kansas City, the only other city in the state with a population over 100,000, also adopted a home rule charter. It was not until after 1947, when the population requirement was lowered to 10,000, that thirteen other Missouri cities adopted home rule charters.

Home rule provisions of some sort are found in the constitutions of approximately three-quarters of the states. Most of these constitutions include charter provisions as the means of implementing home rule. A charter is essentially a "little constitution" by which a local unit is governed within limitations imposed by the state constitution and by the charter itself. So widespread are charter requirements that home rule has been defined as the "authority of a city, under a state constitution and laws, to draft and adopt a charter for its own government."<sup>9</sup> The most recent constitutional change taking account of this association was in Pennsylvania, where a 1968 amendment gave all municipalities (defined as cities, boroughs, townships, and counties) the right to frame home rule charters or to choose among several optional systems of government.<sup>10</sup> In Pennsylvania, as in most states with charter requirements, a lengthy process must be undergone by the local unit before home rule status is achieved. This is the apparent reason why many eligible cities have failed to adopt home rule charters. In Colorado, for example, only twenty-two of the forty-six municipalities of over 2,000 population eligible for home rule had adopted charters as of 1962.

<sup>7</sup> Iowa Code, ch. 42 (1851).

<sup>8</sup> 1875 Mo. Const., art. IX, sec. 16.

<sup>9</sup> Arthur W. Bromage, "Home Rule as of Now," *National Civic Review* (July 1954), p. 2.

<sup>10</sup> Art. IX, secs. 2 and 3.

Colorado, however, is considered among the leaders in charter adoption. A survey conducted in 1968 found that home rule charter adoption appears to be most widespread in Michigan, Texas, Ohio, Minnesota, California, Connecticut, Oklahoma, Colorado, and Oregon.<sup>11</sup>

In a few home rule states charter adoption is not mandatory. For example, home rule municipalities in New York are not required to adopt charters, although local laws in some of these municipalities include provisions normally found in charters.

#### MODEL APPROACHES TO CONSTITUTIONAL HOME RULE

Two distinct model approaches to home rule are reflected in two observably different types of constitutional home rule. The first approach, advocated in the *Model State Constitution* of the National Municipal League (N.M.L.) in its 1921, 1933, and 1948 editions, is that followed in most of the early constitutional home rule provisions (Missouri in 1875, California in 1879 as amended, Colorado in 1876). This model attempts to create what has been termed an *imperium in imperio*, or a state within a state. A locality is granted constitutional authority to frame and adopt its own charter and to pass legislation on local matters. The state legislature retains the power to enact laws on matters of statewide concern. Some constitutions of this type also enumerate specific home rule powers. The assumption under this model is that specific powers and functions can be allocated to the various branches of government, and that local concerns can be separated from state concerns. It has been necessary to rely upon judicial interpretations of what constitutes a local concern. These interpretations have varied from state to state, but often have been extremely conservative in delineating matters of local concern, following Dillon's Rule. When specific home rule powers are enumerated, these tend to be construed as the extent of home rule power. Even in California, considered to be one of the more successful home rule states, court interpretations have not resulted in consistent criteria for what constitutes a local affair.

The second approach, first advanced by the American Municipal Association (A.M.A.),<sup>12</sup> was developed partly in response to the problems in delineating the powers of local government raised by the N.M.L. approach. The constitutions of a few early home rule states such as Michigan and Texas (by judicial interpretation) and most new constitutions since 1912 are examples of the A.M.A. approach. Under this plan, home rule units may exercise any power not specifically denied them by their charters or by

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<sup>11</sup> Kenneth E. Vanlandingham, "Municipal Home Rule in the United States," *William and Mary Law Review* 10 (1968):282.

<sup>12</sup> See Jefferson Fordham, "Model Constitutional Provisions for Home Rule" (Chicago: American Municipal Association, 1953). The American Municipal Association is now the National League of Cities.

general state law, thus reversing Dillon's Rule. Because of its emphasis upon the role of the state legislature, the A.M.A. model has been termed legislative supremacy, not to be confused with the legislative supremacy so prevalent in the late nineteenth century and still in effect in non-home rule states. The A.M.A. model is also described as the concurrent or shared powers approach. Any home rule power, with certain exceptions, may be denied or limited by legislative enactment of general laws; the same power may be exercised concurrently by different levels of government. The legislature must take positive action to prohibit home rule action, and in the absence of specific action the locality has the power to pass local legislation. The A.M.A. model is reflected in such new constitutions as those of Alaska (1959) and Kansas (1961).

In the most recent edition of the *Model State Constitution*<sup>13</sup> the National Municipal League substantially adopted the legislative supremacy approach, retaining its previous *imperium in imperio* model as an alternative. The major difference between the A.M.A. plan and the preferred N.M.L. plan is that under the former plan local powers pertaining to governmental structure, organization, procedure, and personnel cannot be denied or limited by the state legislature. Under the new N.M.L. provisions *no* local matter is exempt from state legislative action. The Advisory Commission on Intergovernmental Relations in its 1967 *State Legislative Program* also recommended a variation of the legislative supremacy model.

Proponents of the A.M.A. plan and its variations contend that in practice it is easier to block a legislature from acting to deny or limit powers to a local unit than it is to obtain authority to perform additional governmental functions. Through provisions for legislative denial and modification of existing home rule powers, however, the state is granted flexibility with which to meet regional needs when these needs are not being met by co-operation among home rule (and non-home rule) units.

The A.M.A. plan calls for self-executing home rule, available to any municipality by adoption of a charter. Self-executing home rule is given as an alternative to mandatory legislative enabling action in the new N.M.L. plan. Both plans require local charter adoption as the prerequisite to home rule.

A different kind of model approach was suggested by Rodney Mott in 1949.<sup>14</sup> Mott suggested patterning the constitutional relationship of the state and its localities after the federal-state division of powers outlined in the United States Constitution. The localities would have all residual powers, while state functions would be limited to those of statewide con-

<sup>13</sup> 6th ed., 1963, revised 1968.

<sup>14</sup> *Home Rule for America's Cities* (Chicago: American Municipal Association).



cern, specifically granted by the constitution. No state has employed this model.

#### **HOME RULE IMPLEMENTATION CLASSIFIED**

Home rule provisions are frequently classified by their method of implementation. Usually judged most desirable are self-executing provisions. Self-executing provisions exist when the constitution grants home rule and provides sufficient procedural direction to enable the people of a locality to take advantage of home rule without the necessity of enabling state legislation. Next most desirable are mandatory provisions, which also assert the home rule grant, but require the legislature to enact implementing procedural statutes. Least desirable among the forms of implementation are permissive provisions, which leave the discretion of granting home rule entirely to the state legislature. Although some claim that legislative implementation may help to foster a new climate for the conduct of state-local relations, there is much to be said for the direct approach of the self-executing grant. "Legislative disinclination to act has no practical cure in 'mandatory' states and none at all in 'permissive' states."<sup>15</sup> Permissive provisions mean that the state legislature rather than the constitution is the real source of home rule power, and that legislative discretion dictates whether there is to be any change in the state-local balance of power.

#### **WHO GETS HOME RULE?**

There is great variation among state constitutions as to which general purpose units of local government are eligible for home rule status. Most constitutional home rule provisions allow only cities to adopt home rule, a situation partially attributable to the fact that the home rule concept was originated by municipal reformers. In some states, villages or other small unincorporated municipalities may also become home rule units. Other states, however, limit the option to adopt home rule to cities meeting specified minimum population requirements.

A few states, increasing in number in recent years, provide for some degree of county home rule in addition to municipal home rule. There has also been a trend toward granting home rule to such general purpose units of government as boroughs and townships, as in Pennsylvania. The Alaska Constitution provides for the adoption of home rule charters by first-class boroughs (counties) and first-class cities. In general, however, home rule has been limited to cities.

The 1870 Illinois Constitution enunciated structural and fiscal powers

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<sup>15</sup> John R. Kerstetter, "Municipal Home Rule," in *The Municipal Year Book 1956* (Chicago: International City Managers' Association, 1956), p. 257.

of county governments in great detail, leading to severe restrictions on county operations in these areas. In the absence of constitutional specification, all other county functions rested with the state legislature, which tended to perpetuate the counties' relatively weak status. This situation is not atypical of that in other states. Home rule has been extended to counties in only a few states where metropolitan government is emphasized and where county government is perceived as capable of going beyond its traditional administrative functions. Even in those states, home rule counties tend to have less autonomy than do home rule municipalities, reflecting legislative lack of confidence in the ability of county officials to manage their own affairs and the traditional role of the county as an administrative arm of the state.

### HOME RULE PROVISIONS IN ILLINOIS AND OTHER STATES

A dramatic change in the state-local division of power in Illinois was one of the important products of the 1969–70 constitutional convention. The constitutional framework for home rule in Illinois — article VII, section 6 — has been described by the chairman of the Committee on Local Government at the 1969–70 constitutional convention as “more sophisticated and comprehensive than most state constitutions. . . . The home rule powers and limitations are specifically delineated, and logically arranged.”<sup>16</sup> The structures of most of these powers and limitations were the result of compromises among competing factions at the convention represented on the Local Government Committee. The processes by which these compromises were achieved have been described elsewhere.<sup>17</sup> Here some of the characteristics of Illinois's new home rule provisions as they relate to other constitutional home rule provisions and to model provisions will be discussed. Let it be noted only that among the major factors in the framing of the innovative Illinois provisions were the absence of a preexisting local government article and the consensus among convention delegates that home rule in some form should be provided in the new constitution.

The basic A.M.A. approach of a broad grant of power to home rule units is apparent in the home rule provisions adopted at the 1969–70 convention. There was little attempt to adopt the allocated power, *imperium in imperio*, approach of such older constitutions as that of Missouri. In Illinois, subject to certain specific limitations, a home rule unit is given a broad grant to “exercise any power and perform any function pertaining to its government and affairs including, but not limited to, the power to regulate

<sup>16</sup> John C. Parkhurst, “Article VII — Local Government,” *Chicago Bar Record* 52 (1970):98.

<sup>17</sup> See Thomas Kitsos, “State Constitutional Revision and the Urban Crisis: The Sixth Illinois Constitutional Convention” (Ph.D. dissertation, University of Illinois, 1972), ch. 8. See also Parkhurst, “Article VII.”

for the protection of the public health, safety, morals and welfare; to license; to tax; and to incur debt.”<sup>18</sup> Similar grants are found in the constitutions of such states as South Dakota, Massachusetts, and Arkansas, but none of these is as comprehensive as the Illinois grant. For example, Massachusetts specifically denies local units the power to tax and the power to incur debt.<sup>19</sup>

Limitations on taxing powers of home rule units in Illinois are stated in article VII, section 6(e). Except as the state legislature may provide, home rule units cannot license for revenue, impose taxes upon or measured by income or earnings, or tax occupations. Other means of revenue raising, however, are within the purview of home rule units.

Neither model constitutional provisions nor provisions in the constitutions of other states are as specific as is the Illinois Constitution in its unique solution to the problem of balancing state and local power.<sup>20</sup> Denial to the home rule units of the right to exercise a power not exercised by the state must be accomplished by a three-fifths majority vote in both houses of the General Assembly. A three-fifths majority vote in both houses is also required for the denial or limitation of a taxing power, other than the taxing powers specifically limited in section 6(e). When the legislature deems an area to be of statewide concern, however, it may pass a general law expressing state exclusivity in this area by simple majority vote of both houses. The concurrent exercise of a power by both the state and home rule units is permitted except as limited or declared exclusive by the legislature. Theoretically, almost any area may be preempted by the state, but the three-fifths voting requirement will make preemption of powers not exercised by the state and of taxing powers difficult.

Another innovative feature of the new Illinois Constitution is the absence of any charter-making requirement for home rule units. A few other states, notably New York and Massachusetts, provide for the exercise of home rule powers by both chartered and nonchartered local units. In Illinois, however, all municipalities of more than 25,000 population and any county with an elected chief executive officer are automatically home rule units. Smaller municipalities may adopt home rule by referendum, while counties providing for an elected chief executive officer also become home rule units. A home rule unit may elect to revert to its former non-home rule status by referendum. Thus the home rule provisions in the Illinois Constitution are far more easily self executed than are the self-executing provisions in the constitutions of other states. Complex charter adoption requirements often mean that large numbers of eligible local units fail to become home rule units.

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<sup>18</sup> Art. VII, sec. 6(a).

<sup>19</sup> Articles of Amendment, art. LXXXIX, sec. 7.

<sup>20</sup> Art. VII, sec. 6(g), (h), and (i).

Section 6 of the local government article ends with an essentially hortatory statement: "Powers and functions of home rule units shall be construed liberally."<sup>21</sup> Like similar exhortations in the constitutions of Alaska and South Dakota, this statement is intended to indicate to the courts that Dillon's Rule no longer applies to home rule units. The exhortation is also directed at the citizens and officials of home rule units in Illinois, who are encouraged to make creative use of their new powers.

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<sup>21</sup> Art. VII, sec. 6(m).

## **TWO YEARS LATER: THE STATUS OF HOME RULE IN ILLINOIS**

**JOHN C. PARKHURST**

Home rule is alive and well in Illinois. Courts and legislatures in other states with older breeds of home rule have subjected the concept to radical surgery and in these states a great deal of home rule's vitality has been lost. Not so in Illinois.

Our young specimen is healthy and growing with confidence. It has been nurtured by an infusion of federal revenue-sharing money. It has been treated kindly by an indulgent legislature. The protections given to it in the 1970 Illinois Constitution have not been broken down. If its first steps have been gingerly taken, perhaps that is a sign of innate caution and restraint foretelling a long and successful life. Indeed, the period of infancy has been encouraging. During the two years since the new constitution went into effect, the careful planning by the doting parents of home rule at the Sixth Illinois Constitutional Convention has paid off.

Knowing how the growth of home rule had been stunted in other states, we tried hard at Con-Con to set forth self-executing, constitutionally-granted powers that would not be dependent upon definition by the state legislature or by local charter-making committees. We tried for a grant which would minimize the role of the courts as the final arbiter in the conflicts which would inevitably develop between local home rule ordinances and state statutes.

When it came to setting forth in the constitution the extent of the power to be granted to home rule units, two schools of thought were evident among convention delegates. Some delegates advocated a system of near-sovereignty for home rule units in order to protect these units, as far as possible, from the power grabs of a hostile legislature and from the emasculating decisions of conservative courts. Many other delegates, however, felt that a complete devolution of autonomous powers to home rule units—including the possibility of a highly unpopular local income tax or payroll tax—would spell the death knell of the proposed constitution. These delegates argued that a constitution with such provisions would be overwhelmingly defeated by Illinois voters. The ultimate compromise was a very broad expression of home rule power, subject to certain specific limitations.

The power grant in article VII (the local government article), section 6(a), of the 1970 constitution is a blend of the general and the specific; the language is probably the broadest in any state constitution. Subject to stated limitations, “a home rule unit may exercise any power and perform any function pertaining to its government and affairs including, but not limited to, the power to regulate for the protection of the public health, safety, morals and welfare; to license; to tax; and to incur debt.”

Section 6 goes on to provide two kinds of limitations to this broad grant of power. First, there are specific limitations spelled out in section 6(e) with regard to the taxing power. These tax limitations are that a home rule unit cannot (1) license for revenue, (2) impose taxes upon or measured by income or earnings, or (3) tax occupations, *unless* the legislature grants those powers. Thus, the more controversial kinds of local revenue-raising powers are precluded for home rule units, and left to the infinite wisdom of the General Assembly and to the unforeseeable vicissitudes of the future. The door is closed, but it is not locked.

The second kind of limitation is included in the “preemption” provisions, contained in section 6(g), (h), and (i). These sections attempt to spell out, in a more specific way than in any other state constitution, the power relationship between the state and the home rule units. The intent is to reduce to a minimum the vast gray area that has led to endless litigation in other home rule states. In most of those states the courts have had to tackle the difficult problem of defining what is a local power versus what is a matter of statewide concern. Needless to say, without a preemption system that sets up a means for solving conflicts between state statutes and local ordinances, the courts tend to hold that the sovereign state wins. Thus home rule has been rendered impotent in many states.

Our preemption system is more precise than any other. We avoided the temptation of trying to write a “laundry list” into the constitution, as other states have done, setting forth all the areas we could think of which were of statewide concern, or, conversely, setting forth all the areas of local concern. Indeed, we set forth a distinction in terms of the *exercise* of a governmental power — whether by local ordinance or by state statute.

We decided to make it tougher for the legislature to deny the exercise of a power by a home rule unit than to exercise the power itself. We wanted to make it difficult for the legislature to pass a series of “no-no” bills, telling city councils and county boards what they may not do. For the “no-nos,” in section 6(g) we require a three-fifths majority vote in both the Senate and the House of Representatives. We also require a three-fifths majority in each house for the limitation or denial of a taxing power other than those specifically limited in section 6(e). Home rule units have a certain degree of

additional power to raise revenue as they see fit for their needs, without easy invasion or limitation by the legislature. We agreed that home rule without money is meaningless.

To balance the equation, however, in section 6(h) we permit the legislature to take *positive* action to preempt a field it considers to be of state-wide concern. The legislature may pass a law in which the state exercises a power — does the job itself — by the traditional majority vote of both houses. In section 6(i) we added one additional wrinkle, which represents a realistic acceptance of the fact that some powers can be exercised concurrently both at the state level and at the local level. Many license laws fall in this category. Under present statutes, the holder of a liquor license pays a license fee to both the state and the locality. There are many other examples of “concurrency” in the exercise of governmental powers at both the state and local level, and we have left it to the legislature to decide whether the exercise of a power should be exclusive at the state level or concurrent.

These three subsections of the local government article — 6(g), (h), and (i) — are loosely referred to as the preemption sections. They are the heart of the home rule concept in Illinois. Through them, we threw the ball to the legislature to shape and control the evolution of the system and to resolve the conflicts. The late Professor David C. Baum, who was the Local Government Committee counsel at the convention, put it this way:

The design of section 6 places great responsibility upon the legislature to ensure that home rule does not degenerate into provincialism which could injure the people of the state. The emphasis on legislative authority to limit home rule, plus the specification of ways in which the legislature must act to assert its authority, makes the Illinois home rule provision unique. Judicial limitations imposed on home rule in other states should not be very persuasive in Illinois because of our unique approach to the problem.<sup>1</sup>

Having handed the ball to the legislature through 6(g), (h), and (i), we hoped that the courts would sit on the sidelines and observe the game. We realized, of course, that the courts would certainly have to get involved in matters of interpretation, but in section 6(m) we asked them for liberal construction of home rule powers when they did get in the game.

And so the first inquiry, after two years of experience, is to see how the constitutional power grant has been interpreted by the courts and how the legislature has used its preemption powers. An examination of the conditions on both fronts is good news for the survival and growth of home rule in Illinois.

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<sup>1</sup> “A Tentative Survey of Illinois Home Rule (Part II): Powers and Limitations,” *University of Illinois Law Forum* (1972), p. 157.



## THE POWER HAS PREVAILED

So far, the judiciary has indeed construed the home rule concept liberally. In fact, in the first three decisions raising basic questions of home rule power to tax and to incur debt coming down from the Illinois Supreme Court, the score is three to nothing in favor of home rule powers.

The first case to come before the court after the new home rule powers went into effect on July 1, 1971, involved the Chicago cigarette tax of five cents a package, to be collected and remitted by the wholesalers selling cigarettes to retailers in Chicago.<sup>2</sup> The court upheld the tax, recited the power grant to home rule units (section 6(a)), commented that it was to construe home rule powers liberally (section 6(m)), and found that the tax was not on "occupations" (proscribed by section 6(e)) because the Chicago City Council had stated that the incidence of the tax was to be on the consumer. Furthermore, citing the report of the Local Government Committee, the court said that the taxing power granted in section 6(a) is not limited to property taxes, but also includes privilege taxes and other non-property taxes. All in all, a significant first victory for home rule.

Then came *Kanellos v. Cook County*,<sup>3</sup> involving a \$10 million bond issue without referendum. The court upheld the home rule county ordinance authorizing the bond issue, noting that a preexisting statute requiring a referendum does not apply when a home rule unit adopts a subsequent ordinance under its new powers. The court further said that if the legislature now wishes to impose a referendum requirement on the bonding power of home rule counties, it will have to muster a three-fifths vote (section 6(g)). This decision put an end to the lingering doubts about the continuing effect of limiting statutes enacted *before* home rule. Such statutes do not count when a home rule ordinance which conflicts with a prior statute is adopted. The ordinance prevails. Another significant victory for home rule.

Next was another decision involving a Cook County home rule ordinance.<sup>4</sup> This was a taxing ordinance imposed on the purchasers of new cars. Since the tax was to be collected within municipalities as well as in unincorporated areas of the county, Evanston and other home rule municipalities in Cook County decided to pass similar ordinances, relying on section 6(c)(1). The municipalities intended to collect the tax themselves instead of having the money go to Cook County. The supreme court, however, had other ideas. It held that 6(c) does not establish a system of preemption of county ordinances by city ordinances, and cited the report of the Local Government Committee to support the notion that 6(c) was to be only a means of resolving conflicts and inconsistencies. Since both city and county

<sup>2</sup> *S. Bloom, Inc. v. Korshak*, 52 Ill. 2d 56, 284 N.E.2d 257 (1972).

<sup>3</sup> 53 Ill. 2d 161, 290 N.E.2d 240 (1972).

<sup>4</sup> *City of Evanston v. County of Cook*, 53 Ill. 2d 312, 291 N.E.2d 823 (1972).



had the power to impose the tax, both were valid: there was no conflict and both could collect the tax. The court said that this did not constitute double taxation, and held that the power in 6(a) is not limited to non-property taxes. (Needless to say, after this decision Evanston and the other municipalities made no effort to collect their taxes.) In short, the court said that the home rule taxing power was broad enough to let everybody—home rule county and home rule municipality alike—use it, until the legislature stopped them by a three-fifths vote.

The *Bloom*, *Kanellos*, and *Evanston* decisions appear to show that the Illinois Supreme Court received our message to leave the ball in the hands of the legislature. Moreover, the court has pointedly reminded the legislature that it can stop the game at any time by a three-fifths vote. When called upon to interpret, the court has indeed construed home rule liberally.

As a matter of fact, an *unintended* home rule power was granted by a liberal interpretation of the court in *City of Salem v. McMackin*.<sup>5</sup> In *Salem*, the court approved the constitutionality of the Industrial Project Revenue Bond Act, by which industrial revenue bonds are issued by municipalities to attract new industrial projects and create jobs. The enabling statute authorized municipalities to issue such bonds for projects located up to ten miles from their boundaries. The home rule issue arose because somebody had dutifully amended the bill in the legislature so that it applied only to non-home rule units. Salem is a non-home rule municipality, and it could clearly put up its new plant ten miles outside its boundaries if it so chose. The court did not wish to put home rule units at a disadvantage in attracting new industry. It said that although they were not covered by the statute home rule units too could issue the new type of revenue bonds, even as to the extraterritorial ten miles, under their home rule powers.

This judicial generosity led Justice Walter V. Schaefer to write a minority opinion. In his opinion Justice Schaefer quoted this author, who, among other constitutional convention delegates, had confidently represented to the convention that home rule carried with it *no* extraterritorial powers, and that the legislature would still have to expressly grant such powers to home rule units. Nevertheless, the court said that home rule units would be acting in only a proprietary capacity outside their boundaries. The majority opinion cited 6(m) as a reminder that the court was to construe home rule powers and functions liberally. Thus, the court held that a home rule unit could put a plant outside its boundaries, and pay for it with revenue bonds even without statutory authority. Even the staunchest home rule advocates at the convention did not realize that we had gone quite that far!

The court also showed a tendency toward liberal construction in *Jacobs*

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<sup>5</sup> 53 Ill. 2d 347, 291 N.E.2d 807 (1972).

v. *City of Chicago*.<sup>6</sup> Chicago adopted a privilege tax under its home rule powers providing that, with certain exceptions, the tax was to be paid for "the use and privilege of parking a motor vehicle in or upon any parking lot or garage" within the city. The parking lot operator's license could be revoked if he did not collect and pay the tax. The question was raised whether this did not constitute licensing for revenue, proscribed by section 6(c) unless the legislature authorizes it — and the legislature has not. No, said the court, it was a tax, and not licensing for revenue. The fact that the operator's license could be revoked if he did not pay the tax did not make it licensing for revenue. The possibility of revocation only served to insure the integrity of the collection procedure, said the court. Another liberal construction, underscoring the obvious fact that home rule power without money means nothing.

These first five cases were all "power" cases — the court was interpreting the scope of the grant of home rule powers, particularly in the revenue field. It is obvious that the court construed this power very broadly — to the total satisfaction of home rule advocates.

But, as the court can give, so can it take away. So far, the only limiting interpretation of home rule power has come in *Bridgman v. Korzen*,<sup>7</sup> where the court followed the familiar and traditional judicial habit of trying to define and circumscribe "local affairs." In this case, Cook County passed an ordinance providing for the payment of real estate taxes in four installments instead of the two installments permitted by statute. The issue was whether the county's ordinance, based upon its home rule powers set forth in 6(a), was really the exercise of a power or the performance of a function "pertaining to its [the county's] government and affairs." The court said no: the county was acting both for itself and for other taxing bodies in collecting and distributing taxes, and therefore the ordinance did not pertain primarily to *its* affairs. (The little word "its" may turn out to be one of the most important words in the constitution.)

In any event, the cases which I have discussed all involved situations where the court was called upon to interpret home rule *power*, as set out in section 6(a). In such cases, so far, the court has been about as liberal as could have been expected.

There is another side of the coin. Besides the power granted in 6(a), there is the matter of *structure*. The local government article was intended to give new flexibility and local option to the matter of governmental structure — in home rule units (section 6(f)) and non-home rule units (section 7(3) and (4)) alike. Such matters as what officers to have were to be left

<sup>6</sup> 53 Ill. 2d 421, 292 N.E.2d 401 (1973).

<sup>7</sup> 54 Ill. 2d 74, 295 N.E.2d 9 (1973).

up to each unit. Some localities might want more officers, or fewer officers, or different officers than in other places.

Acting under the structural flexibility provided for home rule units in section 6(f), Cook County passed an ordinance creating the new appointive county office of comptroller, and transferred to him the same powers which the legislature had given to the Cook County clerk. In *People ex rel. Hanrahan v. Beck*,<sup>8</sup> the supreme court said that the Cook County Board, acting under its home rule powers found in 6(a), could transfer to its appointee the powers and duties of a comptroller, "even to the extent that such exercise conflicts with a statute enacted prior to the adoption of the 1970 constitution. . . ." Consistent, certainly, with the holding in *Kanellos*, and another liberal construction in accordance with the constitutional request in 6(m).

Before we leave the judicial arena, and I restate my conclusion that the power has prevailed so far as the first court tests of home rule are concerned, I want to point to a couple of cases that are on appeal to the supreme court from the lower courts, but have not yet been decided by the court. One such case is *Peters v. City of Springfield*,<sup>9</sup> which involves a clear conflict over home rule power. The city of Springfield passed an ordinance under its home rule power requiring mandatory retirement for firemen in the municipality at age sixty, in the teeth of a state statute making age sixty-three the mandatory retirement age for firemen. The circuit court said that the pre-existing statute prevailed, and that Springfield could not require a lower retirement age. If the supreme court follows *Kanellos* and *Hanrahan*, it would seem that the exercise of home rule power by an ordinance which conflicts with a preexisting statute will prevail and that the circuit court will be reversed. Predictions are perilous, however, and the case has other facets which may permit the court to decide it on some ground other than home rule power.

Incidentally, the audacity of Springfield in tampering with the retirement age of its firemen and the threat of other home rule municipalities to take similar action led to quite a battle in the last session of the legislature. As I have emphasized above, the legislature always has the ball, and can resolve any conflict it chooses. In this case, House Bill 345 was introduced in the Seventy-eighth General Assembly on behalf of the firemen around the state, who did not want the cities to lower their retirement age because it would decrease their pensions. The bill was a pure preemption of home rule power, as understood in section 6(g), and was understood to require an extraordinary three-fifths majority vote to pass. The bill received this ma-

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<sup>8</sup> 54 Ill. 2d 561, 301 N.E.2d 281 (1973).

<sup>9</sup> No. 72-210 (Sangamon County Cir. Ct., Dec. 28, 1972).

jority in the House of Representatives and then ran straight into the opposition of the Illinois Municipal League. The league sent out a "red alert" letter to all its members, warning them that the legislature was about to preempt their home rule authority, labeling such temerity as "critical legislative actions," and calling for "militant support." The battle was on, and the home rule supporters won hands down. The bill never got out of committee in the Senate. The legislature had the ball, but did not want to do anything with it. The supreme court will still have to decide the issue in the *Peters* case.

Another case coming to the supreme court does not involve an interpretation of home rule power under 6(a). Rather, it involves the first real court test of the legislature's power to preempt, and so it opens up a whole new area of problems. A real collision course is underway, involving two circuit court decisions in different counties that are diametrically opposed. The issue involves the heart of the home rule system in Illinois—the unique preemption system devised in section 6(g), (h), and (i). For that reason, I shall discuss the legal issues presented by these two cases in the next section of this paper, which deals with the subject of legislative preemption.

#### **THE PREEMPTION PUZZLE PERSISTS**

While the supreme court has been busily blazing a trail through the forest of home rule questions in Illinois, the puzzle that has surrounded the preemption provisions in the new constitution (article VII, section 6(g), (h), and (i)) still persists. Neither a well-defined policy in the legislature nor a clear-cut understanding of how the legislature is going to preempt home rule powers and functions has yet emerged.

As I showed above, the supreme court has permitted home rule powers to prevail without being substantially watered down by court decision. In addition, several times the court has reminded the legislature that *it* has the ball, just as we intended at Con-Con. But the legislature has not been persuaded to do much with the ball.

Not a single pure preemption bill (I refer to a 6(g) variety requiring a three-fifths vote), so labeled and understood, has passed in over two years! As a matter of fact, the legislature has bent over backwards to avoid inadvertent preemption, which might be thought to occur if a bill passes by a three-fifths vote and is later found to contain an unnoticed limitation of home rule power. To avoid this embarrassing possibility, the legislature has taken to adopting—almost as a matter of course—an amendment to any and all bills which might be thought to affect home rule. This is familiarly known as the "home rule amendment." This ubiquitous home rule amendment is very short and simple. It merely states that the bill in question does

not apply to home rule units.<sup>10</sup> By now, it is almost a ritual, and goes on a bill without debate or serious consideration. In some cases — such as the Industrial Project Revenue Bonds Act, which resulted in the *Salem* case — the amendment takes power away from a home rule unit, rather than preserving it.

The now-common practice of adding the home rule amendment to bills illustrates the concern of the legislature that an unintended preemption should not occur. The amendment is designed to prevent a misinterpretation of what the legislature really means to do. This seems to be all to the good, and a similar attempt to state clearly what the governing body has in mind is also occurring at the local level, in many municipal ordinances that are based upon the new home rule powers.<sup>11</sup> So both the legislature and many of the local governing bodies of home rule units are trying to avoid misinterpretations by attaching the proper label to their enactments: in the legislature by the disclaimer of the home rule amendment, in the city councils by the affirmative recitation of constitutional home rule powers.

This emphasis on labeling has created some difficulties in the legislature, where sometimes the members cannot all agree upon the right label. Under House Rule 4(g), it is the duty of the speaker to decide on points of order, subject to appeal, and, under 4(h), to inform the House “on any point of order or practice pertinent to the pending business.”

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<sup>10</sup> The following examples of the home rule amendment are taken from bills introduced at the legislative session just concluded. In Senate Bill 51, the language in amendment 1 was “this Amendatory Act of 1973 does not apply to any municipality which is a home rule unit.” Another form was in amendment 1 to S.B. 157, which read, “this Amendatory Act of 1973 is not a limit upon any municipality which is a home rule unit.” In S.B. 483, the home rule amendment was built into the bill as filed. Section 37 provided in part, “this Act is not a limit upon any home rule unit.”

<sup>11</sup> This desire of a city council to spell out its intent to act under home rule is illustrated by the language in the following sampling of local ordinances:

Champaign. In ordinance number 1128, passed July 5, 1972, authorizing the acquiring of property by purchase or lease: “Whereas, the City of Champaign is a home rule unit by virtue of the provisions of the Constitution of the State of Illinois of 1970; and whereas the City, as a home rule unit, may exercise any power and perform any function pertaining to its government and affairs, including the power to incur debt. . .” In ordinance number 1143, adopted September 5, 1972, amending the Illinois Local Library Act: “Whereas, under the provisions of the Illinois Constitution of 1970, the City of Champaign, Illinois is a home rule unit, and whereas, as a home rule unit it may exercise any power and perform any function pertaining to its government and affairs, including the power to tax and, whereas, it is the desire of the Council to adopt the Illinois Local Library Act by reference, except the changes hereinafter set forth. . .”

Park Forest. In ordinance number 857, adopted June 12, 1972, levying a property tax for general corporate purposes: “This Tax Levy Ordinance is adopted pursuant to the procedures set forth in the Illinois Municipal Code, provided, how-

House Rule 70 provides for the recording of dissents; several dissents have been filed against rulings by the speaker on whether a given bill would require a three-fifths vote for passage (i.e., whether it was a "preemption" bill under section 6(g) or an "exclusive exercise" bill under 6(h)). Such a situation occurred in the last session of the General Assembly, when the House passed bill 1313 (Public Act 78-729), which amended the law relating to public notices. The speaker had been asked to rule on how many votes would be required for passage, and he ruled that it would take only a simple majority of 89 votes, rather than a three-fifths majority of 107 votes. Representatives Gerald W. Shea and Benedict Garmisa then submitted a written dissent. The dissent claimed that the bill was a limitation of home rule power because it attempted to make certain procedures of home rule units subject to state regulation by only a majority vote. According to the dissent, under section 6(g) a three-fifths vote is required to impose any such limiting procedures on home rule units.

The pitfalls of the labeling process in that instance were further complicated by the fact that the H.B. 1313 *did* receive more than a three-fifths vote. The dissenters said that this was irrelevant because the speaker had ruled that only a simple majority was required. Since the speaker's ruling was determinative, if he had made a mistake and attached the wrong label to the bill the improper ruling would not be cured, no matter how many votes the bill ultimately received.

The dissent process began to pick up steam during the last legislative session. A dissent similar to that written for H.B. 1313 was filed to the speaker's ruling on H.B. 1050 (P.A. 78-458). Both H.B. 1313 and H.B. 1050 passed

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ever, any tax rate limitation or any other substantive limitations as to tax levies in the Illinois Municipal Code in conflict with this Ordinance, shall not be applicable to this Ordinance pursuant to Section 6 of Article VII of the Constitution of the State of Illinois."

Peoria. In ordinance number 9143, adopted July 6, 1972, relating to the demolition or repair of dangerous and unsafe buildings: "Notwithstanding any of the laws of the State of Illinois to the contrary, and pursuant to Article VII, Section 6 of the Illinois Constitution of 1970, Section 8-123 of Chapter 8 of the Peoria City Code, 1957, is hereby stricken in its entirety and in lieu thereof, the following Section 8-123 is added to Chapter 8."

Wheaton. In ordinance number E-1214, adopted September 18, 1972, amending an annexation agreement in the city code: "The City, finding itself to be a home rule unit under the Illinois Constitution of 1970, does herewith exercise a power pertaining to its government and affairs, and does declare that the restriction found in Division 11-15.1-1, Chapter 24, Illinois Revised Statutes, 1971, limiting the term of annexation agreements to a period not to exceed a period of five years from the date of its execution, to be of no force and effect as it may or purports to apply to the City of Wheaton. The City does hereby determine that it may enter into an annexation agreement under this Chapter 6 of its ordinances for a period of not to exceed twelve years from the date of execution thereof."



both houses of the legislature, but the dissents to the speaker of the house's rulings may present an interesting legal question which will determine the validity of similar bills.

In the above-mentioned bills the speaker ruled that only a majority vote was needed; the dissenters thought that a three-fifths vote should have been required because a 6(g) limitation was involved. The reverse twist, however, also occurred. In House Bill 687, which was a bill to establish a statewide medical examiner system, the speaker initially ruled that only a simple majority of 89 votes was required for passage. Subsequently the speaker changed his mind and ruled that a three-fifths vote (107 votes) would be required, apparently on the theory that a limitation of home rule power was involved and that H.B. 687 was a preemption bill under section 6(g) of the constitution. When the bill received only 92 votes, it was declared lost. Supporters of the bill then filed a written dissent contending that the bill did not involve a 6(g) preemption at all, that the speaker's second ruling was wrong, and that the bill should have been declared passed by the simple majority which it received. So the "label" is always subject to challenge, whichever way it goes.

The practical necessity of "labeling," of determining in advance how many votes a bill needs for passage (whether a majority under 6(h) or 6(i), or three-fifths under 6(g)), has been recognized in some instances before the issue is ever presented to the chair for a ruling. Some bills have set forth the specific intention of the sponsors in the body of the bill. Thus the possibility of an erroneous ruling by the chair, a written dissent, and subsequent litigation is eliminated.

No bill stating that it is brought pursuant to 6(g), and therefore requires a three-fifths vote, has passed, although a number of such bills have been introduced.<sup>12</sup> Other bills have stated that they are brought pursuant to 6(h) and (i), as an exclusive exercise of power by the state, and that therefore

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<sup>12</sup> For example, in the last legislative session House Bill 345, mentioned previously in this paper, attempted to make certain statutes dealing with boards of police and fire commissioners applicable to all municipalities, including all home rule municipalities. The bill contained the following section: *Sec. 10-2.1-31. Public Policy. It is declared to be the public policy of this State, pursuant to paragraph (g) of Section 6 of Article VII of the 1970 Illinois Constitution, that this Division of this Article of this Code is applicable to all municipalities in this State including home rule municipalities.*

Slightly different language specifying section 6(g) was included in House Bill 566, which tried to extend sections of the statutes to cover civil service employees in all municipalities other than Chicago. It read as follows: *Sec. 10-2.1-31. This Division imposes a limit under subsection (g) of Section 6 of Article VII of the Constitution upon the power of municipalities having fewer than 1,000,000 inhabitants in relation to the functions covered by this Division.*

only a simple majority is needed for passage.<sup>13</sup> The most celebrated bill of that variety passed amid much fanfare in 1972. That was the highly controversial House Bill 3636 (P.A. 77-1818), now being contested in the courts, and on its way to the supreme court for the first basic decision involving the heart of the home rule concept in Illinois — the preemption provisions.

House Bill 3636 was passed on October 1, 1972.<sup>14</sup> It provides in part that “pursuant to paragraph (h) of Section 6 of Article VII of the Constitution of 1970, the power to regulate any profession, vocation or occupation for which licensing or registration is required by any of the Acts hereinafter listed in this Act, shall be exercised exclusively by the State and may not be exercised by any unit of local government, including Home Rule units.” H.B. 3636 passed the Senate with only a majority — not a three-fifths — vote, although it got three-fifths in the House.<sup>15</sup>

<sup>13</sup> The sponsors of House Bill 66 in the last legislative session wanted to make certain provisions of the Illinois Vehicle Code uniform throughout the state, and to prevent home rule units from passing ordinances to vary the application of the Illinois Vehicle Code. They considered their bill to be an exercise of power under 6(h), and they wanted it to be exclusive. (The author questions the assumption that the state was really “exercising” a power under the provisions of the Illinois Vehicle Code.) The attempt to apply the 6(h) and (i) label to H.B. 66 read as follows: *(c) The provisions of this Chapter shall be applicable and uniformly applied and enforced throughout this State, in all other political subdivisions and in all units of local government.*

*(d) Pursuant to paragraphs (h) and (i) of Section 6 of Article VII of the Constitution of 1970, the powers and functions exercised by the State under this Chapter are exclusive, and such powers and functions may not be exercised by any unit of local government, including home rule units, except as provided for in Sections 15-111, 15-301 and 15-316 of this Act, as amended.*

A slightly different version of the reference to subsections (h) and (i) in the body of the proposed statute occurred in House Bill 67, another attempt to make certain provisions of the Illinois Vehicle Code applicable to all municipalities, including home rule units: *Sec. 18-103. Uniformity and Preemption. Pursuant to paragraphs (h) and (i) of Section 6 of Article VII of the Constitution of 1970, the powers and functions exercised by the State under this Chapter are exclusive, and such powers and functions may not be exercised by any unit of local government, including home rule units unless specific provision for local governmental exercise of such power or function, in whole or in part, is provided for by a provision of this Chapter.*

*The provisions of this Chapter of this Act, as amended, shall be applicable and uniformly applied and enforced throughout this State, in all other political subdivisions and in all units of local government.*

<sup>14</sup> Ill. Rev. Stat., ch. 127, secs. 901-03 (Supp. 1972).

<sup>15</sup> A nice question would arise if a bill labeled a 6(h) actually passed by three-fifths vote of both houses and if the court later said the bill should have been treated as a 6(g). Query: would the label or the actual vote control? To the effect that the label controls, no matter how many votes it gets, is the United States Supreme Court decision of *Powell v. McCormack*, 395 U.S. 486 (1969) (cited in several of the House dissents). That celebrated case involved the ruling of House Speaker John McCormack on the resolution to exclude Adam Clayton Powell from the United States House of Representatives.



Among the professions and vocations covered by H.B. 3636 were real estate brokers, who were licensed by the state and also locally licensed and regulated by many Illinois municipalities. The real estate brokers of Illinois, as a class, filed a suit in Champaign County seeking a declaratory judgment to void the ordinances of all the municipalities in Illinois which license and regulate real estate brokers.<sup>16</sup> The plaintiffs contended that the passage of House Bill 3636 made such ordinances invalid. The defendant municipalities challenged the constitutionality of the bill. They argued that the bill was a section 6(g) preemption and that therefore it required a three-fifths vote for passage, despite the statement contained in the bill itself asserting that it was brought "pursuant to paragraph 6(h)." The court said that the bill was not a 6(g) preemption and that it was valid and constitutional. An injunction was issued restraining all Illinois municipalities, as a class, from enforcing their ordinances licensing and regulating real estate brokers. In short, House Bill 3636 was upheld in the Champaign County Circuit Court.

The bill had a different fate in Cook County. There, Evanston, Chicago, and other home rule municipalities challenged the constitutionality of House Bill 3636.<sup>17</sup> Among the claims of the plaintiffs was that H.B. 3636 was a 6(g) type of preemption and thus required a three-fifths majority vote in both houses of the legislature for passage. The bill did not receive this vote. On July 23, 1973, the Cook County Circuit Court issued a decision holding that House Bill 3636 was unconstitutional for several reasons, one of which was that the bill required a three-fifths majority vote in each house but had not received such a vote. The circuit judge went so far as to conclude that "any bill denying a home rule unit a power or function and giving it exclusively to the state must either be enacted by a  $\frac{3}{5}$  vote majority or it cannot be enacted at all." To leave no doubt at all about what he thought, the judge also stated that section 6(h) was "absolutely inconsistent with Sec. 6(a) as is Sec. 6(i)," and that to hold that House Bill 3636 was constitutional would be to vest licensing power exclusively in the state and "make . . . a mirage of the principle of Home Rule."

Both the Champaign County decision and the Cook County decision are on the way to the supreme court, which will have to decide the ultimate fate of House Bill 3636. In so doing, the court will probably decide the ultimate fate of sections 6(h) and (i). Needless to say, the Local Government Committee and the constitutional convention did *not* consider 6(h)

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<sup>16</sup> Johnson v. City of Urbana, no. 72-C-945 (Champaign County Cir. Ct., June 29, 1973).

<sup>17</sup> City of Evanston v. Dep't of Registration and Education of the State of Illinois, no. 73-L-7377 (consolidated with Fuchrmeyer v. City of Chicago, no. 72-CH-7115) (Cook County Cir. Ct., July 23, 1973).

and (i) a “mirage,” and did not conceive of those sections as being “absolutely inconsistent” with the grant of home rule power.

When the supreme court decides that fate of H.B. 3636 some light will be shed on the puzzle over preemption in Illinois. Either we will move toward a system where *any* interference with home rule powers by the state will take a three-fifths vote (thus making 6(g) the only significant preemption section) or we will retain for the state the right to exercise any power it wants (except for revenue) by a simple majority vote, declaring the power exclusive under 6(h) and thus denying it to home rule units. Again, predictions are perilous, and no one knows what the court will do, but it can certainly be said that the committee and the convention envisioned an interpretation which would leave some life in 6(h), and not strike it dead.<sup>18</sup>

Until the preemption puzzle is better illuminated by the court, we cannot put all the pieces together. We can, however, draw some conclusions from what the *legislature* has done with preemption so far. The net result seems to be a clear victory for the advocates of home rule. Not a single 6(g) preemption bill has passed the legislature in the two years since home rule went into effect, which means that the new system has not produced the kind of serious abuses which the preemption provisions allow the legislature to control.

Neither has there been a movement in the legislature to exercise new powers and to declare them exclusive to the state under 6(h). Except for H.B. 3636, the legislature has not tried to take powers and functions away from the local home rule units by occupying the field itself. There has been no competition between the state and the home rule units to fill vacuums and find new governmental services to perform. Certainly, the process of identifying, classifying, and labeling the powers exercisable under the new

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<sup>18</sup> Besides the possible demise of section 6(h) and (i) in the supreme court consideration of House Bill 3636, another storm cloud is gathering over the preemption concept in the new constitution. I refer to the increasing number of bills in the legislature which attempt to impose uniform standards and procedures upon all Illinois municipalities, through minimum standards in such areas as public notices and open meetings. The question will soon arise whether such “limitations” on home rule units should be considered 6(g) preemptions—and thus require a three-fifths vote for passage—or whether they will be interpreted by the court as matters of statewide concern, not pertaining to local government and affairs—enactable by a simple majority vote—and therefore not an interference with home rule powers. The Committee on Local Government anticipated this storm cloud, and in a section of its report recommended to the convention a provision which would permit such uniform standards and procedures to be enacted by a majority vote. That section of the report was stricken on the floor, however, and three attempts to put it back into the final document were beaten down by the advocates of strong home rule. It would be strange, indeed, if the convention, by insisting on the deletion of that provision, forced the court to attempt to define local powers versus state powers, the very problem that has led to the emasculation of home rule by the judiciary in many states.

constitution has been undertaken in an orderly manner by both the legislature and the home rule units.<sup>19</sup>

All in all, from the friendly court decisions, the hands-off posture of the legislature, and the self-restraint of the local governments themselves, it must be said that the first two years of home rule in Illinois have been encouraging. From this early vantage point, it would seem that the mission has a good chance of succeeding where so many others have failed. Home rule may be an idea whose time has finally come; it appears to be alive and working in Illinois.

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<sup>19</sup> A recent Illinois Supreme Court decision (*Rozner v. Korshak*, no. 45689 (Ill. Sup. Ct., Sept. 25, 1973)) upholding the constitutionality of Chicago's wheel tax ordinance commented on the desirability of identification by the legislature of those bills intended to deny or limit home rule units: "The . . . inadvertent restriction of the authority of home-rule units . . . can be avoided if statutes that are intended to limit or deny home-rule powers contain an express statement to that effect." The court is telling the legislature that it will not consider a bill to be a preemption, even though it passes by a three-fifths vote, unless the bill is properly labeled, so that the intent to preempt is clear.

The *Rozner* decision, incidently, is noteworthy for another reason. It is another example of a liberal interpretation of home rule power. The Chicago wheel tax ordinance, requiring a special city license and the payment of a fee to the city based upon the horsepower of the vehicle, was challenged as being "licensing for revenue" (prohibited by section 6(e)). The court said that the wheel tax ordinance was not licensing for revenue, and the city of Chicago did not attempt to tax under the guise of its power to regulate. Mr. Justice Schaefer, who wrote the opinion, said that Chicago's "'Wheel Tax License' ordinance is frankly a taxing measure . . . and is within the power of the City under section 6(a) of article VII."



## **JUDICIAL DECISIONS INTERPRETING ILLINOIS CONSTITUTIONAL HOME RULE PROVISIONS**

**RUBIN G. COHN**

Bishop Benjamin Boadly, English cleric of the late seventeenth century, was one of the earliest civil and religious libertarians with the audacity to challenge the authoritarianism of the Church. In one of his polemics Bishop Boadly uttered a dictum of such truth that it has been quoted in numerous treatises dealing with the interpretation of constitutions and statutes:

"Nay," said the bishop, "whoever hath an absolute authority to interpret any written or spoken law, it is he who is truly the law giver to all intents and purposes, and not the person who first wrote and spoke them."

Much later, Chief Justice Charles Evans Hughes of the United States Supreme Court stated, in a phrase which has been much distorted and wrenched from context, but which nevertheless expresses the same truth: "The Constitution is what the Court says it is."

So stated, the principle is one of polarity. Constitutions and statutes, of course, seek to express meaning and purpose. Unavoidably, particularly in constitutions, the policies are embodied in words of abstract and generic scope which defy exactitude of intent and certainty of application. Due process, equal protection of the laws, establishment of religion or prohibiting the free exercise thereof, unreasonable search and seizure — these are but a few of the great concepts which by the Constitution of the United States operate as limitations upon the power of government. There are literally thousands of federal and state court decisions which have sought to extract meaning from these concepts. There will surely be thousands more as these concepts take on constantly changing coloration, as science and technology create new insights, new problems, new advances, and new frustrations in the business of life, and as other forces — ethics, custom, logic, politics, tradition — seek to adjust to the new tensions which accompany the growth of society.

Thus it is and will be with the home rule provisions of the 1970 Illinois Constitution. All can agree, in broad terms, with the underlying general purpose of the concept: to establish a power relationship between the state and home rule municipalities and counties which will provide a greater

measure of autonomy in the exercise of local governmental authority, while preserving an overriding though controlled power in the state legislature to deny, limit, preempt, or permit the concurrent exercise of powers which may be exercised by the home rule units. Obviously the general purpose of home rule can be phrased in a number of other ways. For example, home rule is intended to negate Dillon's Rule of the nature of municipal government and powers; or to establish a form of federalism, whereby home rule units, like states under the federal constitution, exercise power not by way of grant but by way of limitation; or to establish a partnership between state government and home rule units which recognizes appropriate spheres of influence for each and creates a balance of power by which the legitimate interest of each can best be realized with a minimum of conflict and a maximum of harmony.

All this is very well, but what does it mean — not in abstraction, but in concrete, particular instances of exercise of power by home rule units? What meaning, for example, is to be ascribed to the core phrase "pertaining to its government and affairs" which modifies the grant of power to home rule units? What is meant in the preemption provision by the phrase "not exercised or performed by the State"? What is the scope of the prohibitions upon home rule units relevant to licensing for revenue or imposing taxes upon or measured by income or earnings or upon occupations?

This paper speaks to court decisions which, in the less than two years since the 1970 constitution has been in effect,<sup>1</sup> have interpreted the home rule provisions. The purpose is to ascertain whether an underlying change in state-local relations is being achieved. The assessment can at best be tentative: there will surely be a maturation process, perhaps of many years duration, before a clearly definable pattern of judicial analysis emerges which will provide standards and criteria by which efforts to exercise home rule powers can be assessed with some measure of confident predictability. In this connection it may be instructive, before looking at the few decisions which have been rendered, to consider some of the psychological and legal forces which will be bearing upon the judicial process as it wrestles with these issues.

### **CONSTITUTIONAL, STATUTORY, AND JUDICIAL LIMITATIONS**

Home rule is hardly a novel concept. It has existed in the form of constitutional and statutory expression for just short of one century. In 1875 Missouri in its constitution embraced home rule for its municipalities. Since then many states, either by constitution or statute, have adopted the concept. Two major factors, however, have negated any meaningful implementation of home rule. The first has been the limitations specified in the

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<sup>1</sup> Only court decisions rendered before April 1973 are discussed in this paper.

constitution or in legislation respecting the exercise of home rule powers. Grants of authority carefully circumscribed to preserve exclusive statewide legislative control over such critical powers as taxation and debt incurrence, and expressing the supremacy of state over local action whenever a conflict exists, have rendered the grants virtually meaningless. The second has been the functional inability of courts to shed an almost compulsive veneration of Dillon's Rule, with the result that customarily grants of home rule powers have been construed adversely to the principle of local governmental autonomy. With very few exceptions, both factors have rendered home rule a mockery. It was this kind of record which led the author, in the 1954 report of the Chicago Home Rule Commission, to express the dismal conclusion that constitutional home rule was "a paradoxical enigma, attractive and appealing, yet unattainable to any significant degree."<sup>2</sup>

It may be that this conclusion is no longer valid, that the innovative approach to home rule in the Illinois Constitution may make it attainable as well as attractive. If this occurs the constitutional convention may have achieved an approach to state-local relationships of watershed significance, one which may alter a long settled course of law — a creation of historic dimensions. But it will not mean that Bishop Boadly's dictum has lost its validity; quite the converse. It will be the result of the law's interpreters, the courts, having become subtly adjusted to the new perspectives of the home rule concept which its adherents insist are embedded in the language and history of the 1970 constitution.

#### **DES PLAINES AND O'CONNOR**

In what may be charged as typical professional intellectual circumlocution, I begin this brief analysis of the decisional law with two Illinois Supreme Court cases which do not mention, much less consider, the issue of home rule. Their relevance to home rule, however, will become apparent.

On January 25, 1971, a full five months before the constitution of 1970 became effective, the supreme court decided *City of Des Plaines v. Metropolitan Sanitary District of Greater Chicago*.<sup>3</sup> Two months later, on March 31, the petition for rehearing was denied and the decision entered the hal-  
lowed, though not necessarily conclusive, realms of law and judicial precedent. It was a simple factual case. The Chicago sanitary district, acting under clear statutory authorization, adopted an ordinance to acquire by eminent domain land in the city of Des Plaines which was within the corporate limits of the sanitary district. The district's purpose was to construct a water

<sup>2</sup> Chicago Home Rule Commission, *Chicago's Government: Its Structural Modernization and Home Rule Problems* (Chicago: University of Chicago Press, 1954), p. 316.

<sup>3</sup> 48 Ill. 2d 11, 268 N.E.2d 428 (1971).



reclamation plant upon the land. That intended use was in clear conflict with the city's zoning ordinance. The district, asserting its sovereignty, refused to seek a zoning variation under the city's ordinance, whereupon the city sought to enjoin the district from using the land so acquired for the intended purpose. The city also sought a declaratory judgment that the district's power to condemn land was subject to the city's power to determine land uses under its zoning authority. The circuit court ruled for the city, the appellate court affirmed, but the supreme court reversed. Approaching the issue purely as one of statutory interpretation, the court held that, absent a clear legislative purpose to the contrary, the statutes and ordinances, to be reconciled, must be construed as allowing the district to exercise its governmental authority free from the city's power to zone. Any accommodation between the respective governmental units in case of conflict was left to the court's authority to prevent the district from exercising its power in an arbitrary manner constituting an abuse of discretion, a factor not urged in the case.

In May 1972, almost one year after the effective date of the new constitution, the supreme court, in *O'Connor v. City of Rockford*,<sup>4</sup> distinguishing *City of Des Plaines*, reversed the Second District Appellate Court. The lower court had sustained Rockford's authority to acquire land and maintain and operate a sanitary landfill in an unincorporated area outside its city limits in violation of a Winnebago County zoning ordinance. Rockford's initial position was that its express statutory authority to acquire such land for such purpose took precedence over the county's zoning power and that it did not need a zoning variation from the county to validate its action. The circuit court, in an action to enjoin Rockford's expenditure of funds for the acquisition of the land and its operation as a landfill, agreed with the plaintiffs, owners of the adjoining land, and permanently enjoined the city from so proceeding. Instead of appealing this decision the city took what it believed to be the decent path out of the dilemma and applied to the Winnebago County Zoning Board for a variation. To the city's dismay, the petition was denied, whereupon the city filed an action for declaratory judgment that the county zoning ordinance was invalid as applied to the proposed landfill site. On the merits the city lost and appealed. At this point the supreme court decision in the *Des Plaines* case came down and instead of pursuing its appeal the city went back to the circuit court to dissolve the injunction issued against it in the first proceeding. The circuit court, on the authority of *Des Plaines*, dissolved the injunction and the appellate court affirmed. The supreme court, however, saw it differently. Distinguishing *Des Plaines*, the court noted the enactment in 1970 of the

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<sup>4</sup> 52 Ill. 2d 360, 288 N.E.2d 432 (1972).



state's Environmental Protection Act with its declared purpose of establishing "a unified state-wide program . . . to restore, protect and enhance the quality of the environment" and granting to the Pollution Control Board authority to adopt regulations pertaining to land pollution and to the state Environmental Protection Agency authority to grant permits "imposing such conditions as may be necessary to accomplish the purposes of the Act." The court held that the county no longer had authority under its zoning ordinance to grant variations for landfills and that the Environmental Protection Agency was now the exclusive agency for granting permits of this kind. The effect of the decision was to restore the injunction against the city and to maintain it in effect "unless and until the said defendants [the city] shall obtain a permit granted by the Environmental Protection Agency."

Neither *Des Plaines* nor *O'Connor* involved the home rule provisions of the Illinois Constitution; the municipal action taken in each case preceded the effective date of that charter. Nevertheless, both cases contain certain implications which are quite important. *O'Connor* seems to be saying either one of two things that could have a substantial relationship to municipal home rule power in environmental protection matters. The first is that the state has effectively occupied the field, thus precluding municipal authority. If it is preemption, then paragraphs (g) and (h) of section 6 are involved, and state legislation, enacted prior to July 1, 1971, preempting a power may not of itself be effective to foreclose municipal home rule authority in this field taken after that date. This depends upon the effect to be given to preexisting state legislation under section 9 of the constitution's Transition Schedule maintaining in force "laws . . . [and] regulations . . . not contrary to, or inconsistent with, the provisions of this Constitution. . . ." There is some decisional law upon this aspect of the problem to which I shall later allude. A related aspect of the issue as thus viewed is the relevance of the provisions of paragraph (i) of section 6 pertaining to the concurrent exercise of power by the state and a home rule unit.

On the other hand, if *O'Connor* means that the control and regulation of the environment is not, in the primary grant of home rule power in paragraph (a) of section 6, a power or function "pertaining to its [the home rule unit's] government and affairs," then the preemption provisions of paragraphs (g) and (h) become irrelevant and municipal power in this area will be wholly dependent upon statutory grant. This would be a wholly different matter conceptually and legally. Although one can visualize a need for municipal regulation and control of the environment, in particular localized applications, it is quite probable that the court, facing the issue squarely, would view environmental problems as essentially unrelated to limited geographic units. The court's view might also be that the state's

power is exclusive even without any specific new preemption of the field, subject, of course, to the state's grant of concurrent or limited exclusive authority to home rule units by legislation.

As to *Des Plaines*, its relationship to home rule depends upon the disposition of a pending appeal in the First District Appellate Court by the city of Des Plaines in litigation initiated by the city after the supreme court decision to prevent the sanitary district from pursuing its purpose.<sup>5</sup> Now relying upon its home rule power, the city seeks to enjoin the district, contending that the constitutional grant of home rule power to it expanded its authority respecting zoning and made the sanitary district's condemnation power subordinate to and dependent upon municipal acquiescence. On November 16, 1972, the Cook County Circuit Court dismissed the city's suit on res judicata grounds, avoiding a decision on the merits. The home rule issue was not before the supreme court in its first decision. If the appellate court should sustain the circuit court, municipal home rule in the important areas of zoning and land use and regulation may be somewhat less than effective in areas of intergovernmental conflict.

The *O'Connor* case also involved the extremely important issue of the existence of municipal power to act beyond the territorial limits of the municipality. Statutory grants of such power in zoning and certain other areas were in existence prior to the grant of home rule power in 1970. In *O'Connor* the court simply held, in a non-home rule context, that the city could acquire and maintain a landfill, pursuant to statutory authority, outside its corporate limits provided that consent by way of permit was given by the state Environmental Protection Agency. *O'Connor* settled no issues concerning the power of a home rule unit to act extraterritorially without benefit of statute.

#### SALEM

The issue of extraterritorial powers of home rule units was dealt with in a somewhat oblique, yet presumably definitive, way, in *People ex rel. City of Salem v. McMackin*,<sup>6</sup> decided by the Illinois Supreme Court on December 1, 1972. At issue was the validity of certain sections of the Municipal Code known as the Industrial Project Revenue Bond Act, pursuant to which municipalities were authorized to construct or acquire an industrial project within or without or partially within and without the municipality, but not more than ten miles beyond the corporate limits. The acquisition was to be financed by revenue bonds issued by the municipality. The project would be leased to industrial concerns for a rental sufficient to pay off the

<sup>5</sup> *City of Des Plaines v. Metropolitan Sanitary Dist. of Greater Chicago*, no. 58604 (Ill. App. Ct., 1st Dist., Feb. 7, 1973).

<sup>6</sup> 53 Ill. 2d 347, 291 N.E.2d 807 (1972).

interest and principal of the bonds. This in brief outline was the financial plan of a program designed to attract industrial developments to Illinois communities. The act expressly stated that it did not apply to any municipality which was a home rule unit and therein lay one of the central problems.

The city of Salem was not a home rule unit. The act was challenged on a number of substantive constitutional grounds, among them that public funds were being expended for a private purpose, that an unconstitutional donation of public property or an extension of credit to private persons was being made, and that the act, in its limited application to industrial and manufacturing plants and to non-home rule municipalities, violated the equal protection guarantees of the federal and state constitutions and the special legislation prohibition of the state constitution.

The court sustained the law in its entirety. The most difficult issue was based on classification of municipalities, the arguments being that (1) home rule municipalities were precluded from engaging in this function and (2) if authorized pursuant to the general home rule grant of power, such municipalities could act only within their corporate limits, the constitution expressing no power to act extraterritorially. The court was equal to the challenge. The home rule grant in section 6(a) and the constitutional directive in section 6(m) that home rule powers and functions shall be liberally construed were broad enough to allow the mechanism for financing the acquisition of industrial projects as provided in the statute under attack, it not being the purpose of the statutory limitation to non-home rule units to preclude the exercise of the same power by home rule units, in such manner as the home rule units would determine. The problem was more subtle in regard to the extraterritorial issue. The constitutional convention history embodied in the Local Government Committee recommendation and report, and in the convention's rejection of amendments which would expressly have granted to home rule units extraterritorial powers as the General Assembly might provide, strongly suggested that such units had no inherent home rule power beyond their corporate limits and that without further clarification it was doubtful whether the legislature could grant such power to them. The court held that the convention history did not mandate either interpretation, that the home rule grant was not a limitation upon the power of a home rule unit to acquire land outside its corporate limits for a proprietary as distinguished from a governmental purpose, and that the legislation did not therefore deny equal protection or constitute special legislation.

There was a strong dissent by Justice Walter V. Schaefer. He argued that convention history clearly showed that home rule units could exercise extraterritorial power not by constitutional grant but only by legislative

authorization, and that absent such authorization the limitation of the Industrial Project Act to non-home rule municipalities created an invalid classification. Moreover, he argued, the statute interfered with the freedom of choice given by the constitution by saying to the people of a municipality, "‘You may have the power granted by this act only if you give up your status as a home-rule unit’ or conversely, ‘If you become a home-rule unit you must give up the power granted by this act.’" The majority opinion, said Judge Schaefer, renders the statutory limitation to non-home rule municipalities meaningless, at least as it suggests that home rule units have the power to purchase land up to ten miles beyond their corporate limits. Finally, and perhaps most ominously in terms of future efforts of home rule units to exercise powers which cannot categorically be classified as purely local in nature, Justice Schaefer concluded as follows:

In my opinion the purposes of this Act — "to relieve conditions of unemployment, to aid in the rehabilitation of returning veterans, and to encourage the increase of industry within this State" are matters that pertain to "the government and affairs" of the State. They become matters that pertain to the government and affairs of a municipality, whether home-rule or not, only pursuant to a delegation of authority from the General Assembly.

In this last statement Justice Schaefer contradicts the majority conclusion that a home rule unit has the inherent power to engage in the functions authorized for non-home rule municipalities by the Industrial Project Act. The opinion of so prestigious a member of the court may augur ill for the exercise by home rule municipalities of powers or functions pertaining to any matters in which the state may be said to have a substantial interest or concern. It may foreshadow a narrow approach to the resolution of conflicts between state and municipal government reminiscent of the customary tendency of courts to favor state supremacy by denying that the function is a matter of local concern or one which pertains to municipal affairs.

#### **BLOOM, EVANSTON, OAK PARK, JACOBS, BRIDGMAN, AND KANELLOS**

It has long been a truism that home rule is an empty concept unless it includes a reasonable measure of local autonomy to raise revenues. No one has ever suggested unrestricted local power. An accommodation between the revenue needs of the state and its local subdivisions is essential to prevent a chaotic, self-defeating revenue policy. The ultimate power to effect that accommodation must rest in the state legislature, whose overview of fiscal policy simply cannot be matched by the more parochial needs of local governments. Given the tendency, unfortunately too restrictive, to write specific limitations upon the state's taxing powers into the constitution, it would indeed be unrealistic to expect the constitution not to be more de-

manding in its controls over local revenue policies. And so it is with the Illinois Constitution. The power to tax is initially recognized as a power pertaining to the government and affairs of a home rule municipality. This itself is a significant constitutional advance since in many so-called home rule states, with some exceptions, the power to tax is not so recognized. Although the general power is then circumscribed by the provisions of section 6(e) which require General Assembly approval for the exercise of municipal power to license for revenue, or to impose taxes upon or measured by income or earnings, or upon occupations, in other taxing areas there appears to be a significant counterlimitation upon the power of the state to curb the revenue authority of home rule units. Thus under section 6(g) the General Assembly cannot deny or limit the taxing power of a home rule unit except by a vote of three-fifths of the members elected to each house. Under section 6(h) the authority of the General Assembly to provide, by law enacted by a simple majority of the members elected to each house, for the exclusive exercise by the state of a power or function of a home rule unit does not apply to the exercise of the taxing power. In addition, section 6(k) appears to limit the authority of the General Assembly in respect to the power of home rule units to incur debt payable from ad valorem property taxes by establishing percentage limits of assessed valuation below which local autonomy cannot be circumvented by state denial or limitation.

In this all-important area a few supreme court decisions of limited though significant impact have been rendered. The earliest was *S. Bloom Inc. v. Korshak* (January 1972)<sup>7</sup> which sustained a Chicago ordinance imposing a cigarette tax upon consumers against multiple challenges that the home rule grant of taxing power in section 6(a) did not include authority to levy non-property taxes without prior legislative authorization and that the tax was in fact a tax on occupations requiring, under section 6(c), express legislative authorization. A much more debatable exercise of taxing power was sustained in *City of Evanston v. County of Cook* (November 30, 1972, rehearing denied January 26, 1973)<sup>8</sup> wherein similar taxes upon purchasers at retail of new motor vehicles were imposed by Cook County and the city of Evanston, both home rule units, the county tax being applicable to sales within the corporate limits of all municipalities as well as in unincorporated areas in the county. In the face of section 6(c), which provides that if a home rule county ordinance conflicts with an ordinance of a municipality, the municipal ordinance shall prevail within its jurisdiction, the court held both taxes to be valid. The provision does not establish

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<sup>7</sup> 52 Ill. 2d 56, 284 N.E.2d 257 (1972).

<sup>8</sup> 53 Ill. 2d 312, 291 N.E.2d 823 (1972).

a principle of municipal preemption but is simply intended to give precedence to municipal power when necessary to resolve conflicts and inconsistencies between municipal and county ordinances which are in effect in the same territory. In this case, said the court, there is no conflict within the meaning of section 6(c) but simply the exercise of a concurrent power, which although it may have undesirable economic consequences does not violate the constitutional principle.

Three judges dissented, including Justice Schaefer, an extraordinary occurrence in Illinois Supreme Court experience. Referring to convention explanations of the meaning of section 6(c) by Mr. John Parkhurst, chairman of the Local Government Committee, the dissenters could find no basis for the majority argument that a dual exercise of taxing power was not a conflict within the meaning of section 6(c). The decision has resulted in the repeal or nonenforcement of the municipal ordinance in Evanston as well as in five other home rule municipalities in Cook County which had enacted similar ordinances.

In *Oak Park Federal Savings and Loan Association v. Village of Oak Park* (January 26, 1973, application for rehearing denied May 15, 1973)<sup>9</sup> the attempt by a home rule municipality to exercise the power under section 6(1) to impose taxes upon designated areas within a home rule unit for the payment of debt incurred to provide special services to such areas was held invalid by the supreme court. The home rule unit could not rely upon provisions of the state Revenue Act of 1939 in assessing properties and levying special service area taxes; that act mandates uniform ad valorem property taxes only. Moreover, the power under section 6(1), while not subject to preemption or denial by action of the General Assembly under sections 6(g) and (h), nevertheless requires enabling state legislation before it may be exercised by home rule units.

Another decision favorable to home rule unit revenue powers is *Jacobs v. City of Chicago* (September 1972),<sup>10</sup> which sustained Chicago's tax upon owners of vehicles "upon the use and privilege of parking a motor vehicle in or upon any parking lot or garage," against the challenge that the tax was a license tax for revenue which under section 6(c) required express statutory authority. The court held that since the tax was upon the owner or user of a vehicle and not upon the licensed parking lot owner or operator, who simply collected the tax as agent for the city, it was not a license tax for revenue. It was the same rationale employed in the *Bloom* case, where the contention that the cigarette tax was an unauthorized tax on occupations was rejected because the incidence of the tax fell on the consumer and not on the person engaged in an occupation as a seller.

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<sup>9</sup> 54 Ill. 2d 200, 296 N.E.2d 344 (1973).

<sup>10</sup> 53 Ill. 2d 421, 292 N.E.2d 401 (1973).



A disturbing decision is *Bridgman v. Korzen* (September 1972)<sup>11</sup> in which the supreme court invalidated a Cook County ordinance providing for the payment of real estate taxes in four installments rather than the two installments provided in the state Revenue Act of 1939. With two dissents the court relied upon the narrow ground that tax collection was not a power or function pertaining to the government and affairs of Cook County since the power of collection was exercised in behalf of all taxing units in the county. The rationale is not very persuasive and one can only hope that a more expansive view of the home rule concept will prevail in other cases involving governmental power exercised in behalf of other governmental units where there are no compelling interests to deny the existence of such power.

One final decision of great significance must be noted. In *Kanellos v. County of Cook* (May 1972)<sup>12</sup> the supreme court sustained a county ordinance providing for the issuance of \$10 million in general obligation bonds without a referendum. A state statute enacted before the 1970 constitution became effective required a referendum as a condition to the issuance of such bonds.

At issue in *Kanellos* was the delegation of power to home rule counties to incur debt under section 6(j). The section is silent as to the necessity for a referendum. The further critical issue of whether statutes enacted prior to the effective date of the constitution can operate as limitations upon the exercise of home rule powers was also before the court. Holding with the county on both issues, the court held that preconstitutional statutory enactments in conflict with a grant of home rule power have no validity as law under section 9 of the Transition Schedule. Section 9 preserves in force "all laws, ordinances, regulations and rules of court not contrary to, or inconsistent with, the provisions of this Constitution. . . ." To hold otherwise would effectively nullify the home rule grant and give unintended scope to the power of the General Assembly to deny or limit home rule powers or functions or to preempt the field. The decision on the facts seems sound, but a probable and supportable rationale is that the decision does not invalidate all preexisting state enactments dealing with grants of power to or limitations upon powers of home rule units, absent contrary affirmative action by the home rule unit.

#### OTHER CASES

Indications that a home rule unit must take affirmative action to invalidate the effect of a preexisting state statute within the home rule unit's jurisdiction are contained in a Madison County Circuit Court decision of

<sup>11</sup> 54 Ill. 2d 74, 295 N.E.2d 9 (1973).

<sup>12</sup> 53 Ill. 2d 161, 290 N.E.2d 240 (1972).

March 2, 1973.<sup>13</sup> The Springfield Human Relations Commission claimed that the grant of home rule powers negated existing state legislation dealing with municipal affairs, but the decision held the state Public Meeting Law, known as the Scariano Act, to be applicable to home rule municipalities. Judge James Monroe distinguished *Kanellos* on the ground that the Cook County action in adopting an ordinance in conflict with state law gave it precedence over such state law. Such was not the case with the Scariano Act, where the city of Springfield had taken no affirmative action to modify or repeal that law.

An earlier similar holding, lacking, however, the detailed rationale of Judge Monroe, was rendered by the Circuit Court of Sangamon County. It gave precedence to a pre-1971 state statute establishing a minimum mandatory age of sixty-three for retirement of municipal firemen.<sup>14</sup> The city of Springfield had passed an ordinance requiring retirement at age sixty. On the *Kanellos* issue the court simply notes that that case is distinguishable but it does not say why.

## CONCLUSION

In this complex urban world the effectiveness of home rule depends upon a variety of factors. A sympathetic judicial response is only one of the factors, albeit a very important one. As already noted, there is not as yet sufficient judicial interpretive experience to suggest an emerging pattern. At this stage the most that can be said is that the record is spotty, but that the long-range prognosis is cautiously hopeful.

<sup>13</sup> Illinois News Broadcasters Ass'n v. Springfield Human Relations Comm'n, no. 72-Z-141 (consolidated with Springfield Broadcasting, Inc. v. Gingold, no. 72-Z-142) (Madison County Cir. Ct., Mar. 2, 1973).

<sup>14</sup> Peters v. City of Springfield, no. 210-72 (Sangamon County Cir. Ct., Dec. 28, 1972).



## HOME RULE, PREEMPTION, AND THE ILLINOIS GENERAL ASSEMBLY

EUGENE GREEN

In designing a home rule provision for Illinois, members of the Committee on Local Government of the Sixth Illinois Constitutional Convention were aware of the not-always-successful course which home rule has taken in other states. In many home rule states, local actions have been negated by hostile state legislatures. The judiciary has tended to remain bound by the doctrine of Dillon's Rule. Time and again the courts have refused to uphold functions and powers thought "to be so local that the legislature is excluded. Most of the cases sustaining local power over state authority deal with local structure, procedure and personnel; they do not include substantive powers. . . ."<sup>1</sup>

The Local Government Committee, however, felt that careful draftsmanship would help to avoid many of the problems faced by home rule in other states. The committee report contains a cogent statement about the hopes for home rule:

The fundamental reason for favoring home rule over the existing system of legislative supremacy is this: Local governments must be authorized to exercise broad powers and to undertake creative and extensive projects if they are to contribute effectively to solving the immense problems that have been created by increasing urbanization of our society.<sup>2</sup>

### CONSTITUTIONAL CONVENTION HISTORY

Many of the delegates to the Sixth Illinois Constitutional Convention had campaigned in favor of home rule. The reports of the Local Government Committee and the floor debates appear to show that there was not much question as to whether or not the state of Illinois should adopt home rule, but there was much argument concerning the balancing of authority between the state and local units of government. Given the facts that Illinois had long been a strong Dillon's Rule state and that the Illinois General

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<sup>1</sup> Illinois, Sixth Constitutional Convention, Committee on Local Government memorandum, David C. Baum, "A Preemption Primer," April 8, 1970.

<sup>2</sup> Ill., Sixth Const. Conv., *Record of Proceedings, Committee Proposals—Member Proposals*, Committee on Local Government Proposal 1 (Springfield, 1972), VII:1605. Emphasis omitted.

Assembly had been somewhat less than benevolent in dealing with central city problems, the delegates set for themselves an extremely difficult task.

Article VII, section 6(a), of the 1970 Illinois Constitution states that:

Except as limited by this Section, a home rule unit may exercise any power and perform any function pertaining to its government and affairs.

The immediate problem faced by the Local Government Committee was how to give some operational meaning to “pertaining to its government and affairs,” so that neither the courts nor the state legislature could negate the intention of the delegates to give local governments broad powers to enable them to solve problems caused by increasing urbanization. The solution proposed in the report of the Local Government Committee and adopted by the delegates is contained in the following three subsections<sup>3</sup> — (g), (h), and (i) — of article VII, section 6:

(g) The General Assembly by a law approved by the vote of three-fifths of the members elected to each house may deny or limit the power to tax and any other power or function of a home rule unit not exercised or performed by the State other than a power or function specified in subsection (1) of this section.

(h) The General Assembly may provide specifically by law for the exclusive exercise by the State of any power or function of a home rule unit other than a taxing power or a power or function specified in subsection (1) of this Section.

(i) Home rule units may exercise and perform concurrently with the State any power or function of a home rule unit to the extent that the General Assembly by law does not specifically limit the concurrent exercise or specifically declare the State’s exercise to be exclusive.

These subsections are referred to as the preemption provisions of the constitution. They spell out the most important ways in which the legislature plays a role in Illinois home rule; other subsections contain additional references to the role of the General Assembly. Subsection 6(g) mentions two possible denials or limitations by the General Assembly of powers of home rule units. The first of these powers is the power to tax. Other than “licensing for revenue or imposing taxes upon or measured by income or earnings or upon occupations,”<sup>4</sup> the General Assembly cannot deny or limit the power to tax of a home rule unit except by the extraordinary majority of three-fifths of the members elected to each house. The Local Government Committee arrived at this extraordinary majority as a compromise between the desire that “home-rule units . . . should receive greater protection from legislative control over revenue matters than now exists in Illinois . . .” (i.e., under the 1870 constitution) and the desire that “the legislature should not be totally excluded from [the] local revenue issue because it should have

<sup>3</sup> Subsection 6(1) deals with special assessments and taxation for special services.

<sup>4</sup> Art. VII, sec. 6(e).

power to protect the state revenue base from depletion by local taxation. . . .”<sup>5</sup> The Local Government Committee felt that home rule would be a “mere skeleton” if the revenue power of home rule units could easily be taken away by the General Assembly. Revenue power was rightly considered the crux of the home rule concept: substantive power is meaningless without the revenue to put the power to use.

The second possible denial or limitation mentioned in subsection 6(g) deals with state legislative preemption of “any other power or function of a home rule unit not exercised or performed by the State. . . .” In balancing state sovereignty against local autonomy, the Local Government Committee had doubts concerning the wisdom of granting complete autonomy involving *any* power or function to a home rule unit. Therefore, the committee distinguished between a mere denial or limitation of a home rule power or function by the General Assembly and the actual exercise of a power or function by the General Assembly on behalf of the state: “home rule units should be protected against sudden, massive denials of power by ‘laundry list’ legislation.”<sup>6</sup> Thus, a mere denial or limitation of a home rule power can only be enacted by three-fifths of the membership of both houses of the General Assembly. Subsection (h), however, allows for preemption by only a simple majority (“specifically by law”) “when a state statute actually exercises a governmental power or authorizes a state agency to do so.”<sup>7</sup> In balancing state sovereignty against local autonomy, the Local Government Committee felt that “the state interest is much more significant than where the statute merely denies the power to local governments.”<sup>8</sup> Furthermore, due to the rapidity of change in our modern technological society, what may pertain to local government and affairs today may become a state concern in the very near future. This was another strong argument for requiring only a simple majority for a “positive” preemption by the General Assembly.

Another distinction involves the exclusive as opposed to the nonexclusive exercise of state power. Subsection 6(i) provides for the state and home rule units to exercise their powers concurrently if the General Assembly “by law does not specifically limit the concurrent exercise or specifically declare the State’s exercise to be exclusive.” The purpose of this distinction is two-fold. First, there is no good reason for eliminating a concurrent exercise of powers in a given area if conflict does not arise. For example, the state may want to set minimum standards concerning food purity. But unless the

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<sup>5</sup> Ill., Sixth Const. Conv., *Record of Proceedings*, Local Government Committee Proposal 1, VII:1640–41.

<sup>6</sup> *Ibid.*, VII:1642.

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*

state declares exclusivity in the area, there is no reason why a home rule unit could not enact even higher standards of purity. A second purpose of this distinction is that it should act as a guideline to the courts that concurrent local action is to be permitted unless a contrary legislative intent is expressed. Possible ways in which the General Assembly may express exclusivity are as follows:

One way is to pass a law which imposes state-wide rules and regulations. . . . Some laws might provide for the carrying out of functions by state agencies; some might impose procedural requirements or positive duties on local units in exercising powers; some might delegate functions or duties to local governments. . . ; some might merely authorize local governments to act, but within limits of substance and procedure. . . .<sup>9</sup>

In debating the preemption provisions of the new constitution, delegates to the constitutional convention were most concerned with the distinction made in subsections 6(g) and 6(h) concerning the General Assembly's ability to preempt by a vote of three-fifths of the members elected to each house in the event of the denial of a power or function to a home rule unit (sec. 6(g)) and the General Assembly's ability to preempt by only a simple majority ("specifically by law") in the case of affirmative action (sec. 6(h)). The opposition to this distinction fell into two broad groups, which may be termed the strong state government forces and the strong home rule forces.

The strong state government forces supported an amendment by delegate Robert L. Butler which basically called for enabling the state legislature to enact any preemption legislation by a mere majority vote. This proposed amendment struck a severe blow at those who felt that local government revenue power was the crux of the concept of home rule. The strong state government forces argued that: (1) due to the fact that most localities in Illinois are dominated by a single political party, the state legislature, which represents the political environment of the state as a whole, should not be stymied by a three-fifths provision, and (2) looking at the past compositions of the General Assembly, it is politically unrealistic to expect that a three-fifths majority of the elected members of both houses could be mobilized on a preemption bill. The state legislature is "not going to run wild" and do away with home rule. State sovereignty must be protected. This amendment failed by a vote of 20-69.<sup>10</sup>

The strong home rule forces supported an amendment by the vice-chairman of the Local Government Committee, Philip J. Carey. This amendment basically called for *any* preemption on the part of the General Assembly to be enacted by a three-fifths vote of the members elected to each house. It aroused the wrath of those who felt that the state must be able to move quickly into any area of government where standardization of procedures

<sup>9</sup> Ibid., VII:1644.

<sup>10</sup> Ill., Sixth Const. Conv., *Record of Proceedings, Verbatim Transcripts*, IV:3083.

and requirements may be deemed necessary. The strong home rule forces argued that: (1) the concept of home rule cannot be very meaningful if, by a mere majority vote, it can be taken away, for the status of home rule would then probably change with every session of the General Assembly, (2) frivolous preemption bills could be introduced each legislative session in order to blackmail pro-home rule representatives and senators into voting for other pieces of legislation in order to protect home rule powers and functions, and (3) in effect, Illinois would not have home rule because the General Assembly could, by a mere majority vote, preempt all home rule powers and functions other than the revenue power. The strong home rule forces also questioned whether the General Assembly could get around the three-fifths provision of subsection 6(g) simply by enacting a preemptive law by a simple majority vote, setting up an agency to carry out the preemptive power or function, and then failing to appropriate enough funds to the agency to enforce that power or function. The strong home rule forces argued that this condition of local governmental dependency on state government is exactly what the concept of home rule was supposed to eliminate. Nevertheless, the Carey amendment failed by the slightly closer vote of 42-61.<sup>11</sup>

By agreeing with the preemption provisions of the majority report of the Local Government Committee, the majority of the delegates felt that they had struck a politically realistic balance between legislative supremacy and protection of the powers and functions of home rule units of government. The three-fifths requirement would protect home rule units from both an erosion of their revenue power and the evil of "laundry list" legislation. The General Assembly was still free to affirmatively preempt any home rule power or function, other than revenue, by a majority vote. The balance of this paper deals with the General Assembly's initial reactions to the preemption provisions of the 1970 Illinois Constitution.

#### **SEVENTY-SEVENTH GENERAL ASSEMBLY**

The Seventy-seventh Illinois General Assembly was the first to assemble under the new constitution. Although only one significant preemption bill was enacted, approximately fifty preemption bills were introduced, and about half of them received favorable votes in the House of Representatives. Most of these bills were introduced by Republicans, with the exception of H.B. 4383, introduced by Representative Robert E. Mann, an independent Democrat.<sup>12</sup>

<sup>11</sup> Ibid., IV:3105.

<sup>12</sup> An additional way in which the General Assembly has acted in regard to home rule is the so-called "home rule amendment," attached to a number of bills in both the Seventy-seventh and the Seventy-eighth General Assembly. This amendment simply states that the bill in question does not apply to a home rule unit.

In April 1971, Representative John H. Conolly introduced thirty-eight preemptive bills (H.B. 2780–2817). These bills provided that the powers and functions set forth in them were to continue to be the exclusive powers of the state. Thirteen of the bills (H.B. 2787, 2792–2801, 2804, 2805) were tabled in the House. House Bill 2791 was tabled in the Senate. The remaining twenty-four bills passed the House, but died in the Senate after reaching the order of third reading. The following list indicates the substantive areas of the thirty-eight Conolly bills:

- 2780 public utilities
- 2781 gas pipeline safety
- 2782 motor carriers of property
- 2783 electrical suppliers
- 2784 railroad, union depot, and terminal companies
- 2785 railroad employee sanitary conditions
- 2786 fencing and operating railroads
- 2787 dangers of railroad crossings on same level
- 2788 crossings of one railroad with another
- 2789 protection of persons and property at railroad crossings
- 2790 use of eminent domain in relation to gas
- 2791 Insurance Code
- 2792 nonprofit hospital service plan
- 2793 mutual district, county, and township insurance companies
- 2794 farm, county, and township mutual fire and lightning insurance
- 2795 medical service plan
- 2796 voluntary health service plans
- 2797 vision service plan
- 2798 dental service plan
- 2799 pharmaceutical service plan
- 2800 guaranteeing titles to real estate by corporations
- 2801 consumer installment loans
- 2802 credit unions
- 2803 financial planning and management services
- 2804 consumer finance
- 2805 sales finance agencies
- 2806 community and ambulatory currency exchanges
- 2807 disposition of unclaimed property
- 2808 development credit corporations
- 2809 fiduciary capacity of foreign corporations, including banks
- 2810 sale of exchange
- 2811 buying and selling of foreign exchange
- 2812 pawnshops societies
- 2813 administration of trusts by trust companies
- 2814 fiduciary capacity of foreign corporations, including banks
- 2815 Banking Act
- 2816 Savings and Loan Act
- 2817 alcoholic liquors

If passed, these bills would have precluded any concurrent jurisdiction by home rule units in the above areas. Even if home rule units should enter



any of these fields, however, the courts would probably be called on to decide if these are legitimate concerns of such units.

The voting pattern that developed in a closely divided legislature on the twenty-five bills which were called to a vote followed this pattern: (1) Chicago Democrats voted against these preemptive measures, (2) Republicans voted for these measures, and (3) a number of downstate Democrats voted affirmatively on these bills. Of special significance is the fact that Chicago representatives could not win the support of the Democratic House minority leader, who consistently voted present. It appears that the concept of home rule has not been able to break through the traditional Democratic-Republican and downstate-Chicago divisions within the state legislature.

Representative Frank P. North introduced five preemptive bills in April 1972. These bills (H.B. 4144-4148) concerned such matters as the regulation of the equipment of automobiles, vehicle license plates, the size, weight, and load of vehicles, and the like. All five bills involved amendments to the Illinois Vehicle Code. These bills were tabled in the House in May 1972.<sup>13</sup>

Other preemptive legislation introduced included a bill defining and determining mental incapacity (Hall, H.B. 2316), tabled in the House; a bill concerning the taxation of cigarettes (Sours, S.B. 1506), tabled in the Senate; a constitutional amendment to eliminate county home rule (Bluthardt, H.J.R. Constitutional Amendment 16), tabled in the House; a bill limiting the city of Chicago's corporate tax levy (Meyer, H.B. 4410), tabled in the House; a bill limiting to 3 percent of assessed value of taxable property the amount of debt payable from ad valorem tax receipts that may be incurred without referendum by a home rule municipality (Mann, H.B. 4383), tabled in the House; and H.B. 4680.

House Bill 4680 was an attempt to freeze "any tax levied by a unit of local government or school district for any purpose or for any fund" at the 1972 level until at least January 1, 1975. Although this bill received a constitutional majority in the House, under section 6(g) of the local government article of the new Illinois Constitution a three-fifths vote is required in order for the legislature to limit the taxing power of home rule units. The bill did not receive the necessary three-fifths vote, whereupon its chief sponsor, Representative C. L. McCormick, tabled the bill on June 22, 1972. Once again, most of those voting affirmatively were either Republicans or downstate Democrats and most of those voting negatively were Chicago-area Democrats. The appeal to voters of a tax freeze is obvious. Chicago-area Democrats felt that the passage of this bill would have severely cut into powers of school districts and of units of local government — home rule and

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<sup>13</sup> Senate Bill 192 (P.A. 77-706) requires local traffic regulations, including those of home rule units, to conform to traffic regulations set by the General Assembly in the Illinois Vehicle Code. This bill was passed by a simple majority in both houses.

non-home rule. At a special session of the state legislature which convened on November 26, 1972, a similar bill was introduced in behalf of Governor Richard B. Ogilvie. This bill was also not enacted.

The preemptive bill that caused the most controversy, and the only major bill of this type which was enacted into law, was House Bill 3636 (Public Act 77-1818), introduced in October 1971. It is commonly referred to as the Occupational Licensing Act. Section I of the bill as passed reads as follows:

Pursuant to paragraph (h) of Section 6 of Article VII of the Constitution of 1970, the power to regulate any profession, vocation or occupation for which licensing or registration is required by any of the Acts hereinafter listed in this Act, shall be exercised exclusively by the State and may not be exercised by any unit of local government, including home rule units.

The act goes on to list thirty acts covering various occupations and professions:<sup>14</sup>

- Architectural Act
- Podiatry Act
- Dental Surgery and Dentistry Act
- Funeral Directors and Embalmers Act\*
- Land Surveyors Act
- Medical Practice Act
- Nursing Act
- Optometric Practice Act
- Pharmacy Practice Act
- Physical Therapy Registration Act
- Professional Engineering Act
- Structural Engineering Act
- Psychologist Registration Act
- Public Accounting Act
- Real Estate Brokers and Salesmen Act
- Certified Shorthand Reporters Act\*
- Social Workers Registration Act
- Tree Experts Act\*
- Veterinary Medicine and Surgery Practice Act
- Water Well Contractors License Act\*
- Detection of Deception Examiners Act\*
- Sanitarian Registration Act\*
- Business and Vocational Schools Act\*
- Water Well Pump Installation Contractors Licensing Act\*
- Nursing Home Administrators Licensing Act\*
- Barbers Act\*
- Beauty Culture Act\*
- Detective and Detective Agency Act\*
- Horseshoeing Act\*
- Insurance Code\*

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<sup>14</sup>Asterisk (\*) indicates occupation which would have been eliminated from House Bill 3636 by a Democratic-sponsored amendment.



On November 2, 1971, Governor Ogilvie presented a message on preemptive legislation to the Seventy-seventh General Assembly. He stated:

There are compelling reasons for enacting legislation which will clarify any doubts and will reserve to the state exclusive authority in such matters as those addressed by House Bills 3636, 2780-2817, and others.

The parceling out of licensing and regulatory authority over these various matters to home rule or other units of local government could have serious consequences. Such fragmentation would inconvenience those persons who are regulated, hinder the efficient delivery of services, and endanger the protection now afforded the consumers of those services.

In general, those activities presently regulated by the state are of such a nature as to not be compatible with either concurrent state-local regulation or exclusively local regulation.<sup>15</sup>

On the same day as the governor's message, less than a month after it had been introduced, H.B. 3636 passed the Republican-controlled House with very little debate by a vote of 124-27. Most of the negative votes came from the Chicago Democrats. The issues had been debated the previous spring in regard to H.B. 1553, which was an almost exact duplicate of H.B. 3636. H.B. 1553 had passed the House but had been killed in committee in the Senate. In the Senate, H.B. 3636 received extensive debate. The arguments were basically those that appeared in an article by Senator Cecil A. Partee, a Democrat, and president pro tempore. In reference to H.B. 1553, referred to above, Partee stated:

The special interests that feared turning over power to the people, came up with a House Bill to restrict home rule. . . . It would have taken from home rule units . . . those licensing powers where the state presently exercised them. But it ignored the fact that many local governments regulated such acts concurrently, meaning . . . that powers being exercised previously were . . . being taken away from local government.

The real value of the licensing power to cities and counties is that regulation is handled at the level closest to the people, instead of by a big faceless bureaucracy which is unable to take local differences and variances into consideration.<sup>16</sup>

In direct reference to H.B. 3636 Partee added:

I think we need to start a counter lobby to try to change some minds . . . unless we want to see home rule completely emasculated. If the special interests win this one, they'll go on to some other aspect of home rule and try to take it away from the people too.<sup>17</sup>

H.B. 3636 passed the Senate on April 25, 1972.<sup>18</sup> The vote was 34-20.

<sup>15</sup> "Preemption," 1971 Session, Seventy-seventh General Assembly, *Legislative Messages*, Richard B. Ogilvie, Governor of Illinois.

<sup>16</sup> Cecil A. Partee, "They Are Out to Get You," *Illinois Municipal Review* (April 1972), p. 4.

<sup>17</sup> *Ibid.*, p. 5.

<sup>18</sup> The Senate vote on H.B. 3636 was taken little more than a month after home rule had been defeated in nine Illinois counties. Opponents to home rule in some of

The Chicago Democrats tried to adopt a number of amendments but all were defeated. One of these amendments would have eliminated from the bill all those occupations listed above that are followed by an asterisk. Six Democrats — five from downstate and one from Chicago — voted for the bill.

The bill was signed into law as Public Act 77-1818<sup>19</sup> on April 28, 1972. In a news release on May 1, the governor commented:

This is an important victory for responsible government. This legislation protects businessmen and professions from unnecessary harassment and chaotic local regulation. . . . It also shows that this legislature can function effectively.<sup>20</sup>

Others, however, are not as optimistic concerning the consequences of this act. The late David C. Baum, professor of law at the University of Illinois, noted that P.A. 77-1818

is particularly broad in at least two respects. First, since it applies to all local governments, not just home rule units, it seems to preclude local regulation formerly sanctioned by statute, as well as new home rule regulatory and licensing schemes. Second, it applies to all regulation, not just local licensing which has been the major feature of home rule objected to by various business interests. This raises the possibility that the named professions and occupations may be completely free of local control in all aspects of their work.<sup>21</sup>

House Bill 3636 is being challenged in *City of Evanston v. Department of Registration and Education of the State of Illinois*,<sup>22</sup> on the following grounds:

1. fail[s] to meet the requirement that "a bill expressly amending a law shall set forth completely the sections amended" (Art. IV, sec. 8).
2. the bill attempts to deny or limit powers or functions of home rule units not exercised or performed by the state even though the bill was not approved by a vote of 3/5 of the members elected to each House (Art. VII, sec. 6(g)).
3. House Bill 3636 is not confined to one subject matter . . . in violation of Art. IV, sec. 8.
4. The provisions of House Bill 3636 have the effect of permitting . . . discriminatory acts without the sanction of revocation or suspensions of a real estate broker's license . . . in violation of the 14th Amendment of the Constitution of the United States.<sup>23</sup>

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these counties expressed support for H.B. 3636 and urged that home rule not be adopted until the General Assembly had acted. See the following background paper, "Home Rule Referenda in Illinois," by Susan B. Mack, pp. 61-71, for a discussion of this point.

<sup>19</sup> Ill. Rev. Stat., ch. 127, secs. 901-03 (Supp. 1972).

<sup>20</sup> "News From the Office of Governor Richard B. Ogilvie," May 1, 1972.

<sup>21</sup> David C. Baum, "A Tentative Survey of Illinois Home Rule (Part II): Legislative Control, Transition Problems, and Intergovernmental Conflict," *University of Illinois Law Forum* (1972), p. 569, footnote 30.

<sup>22</sup> Cook County Cir. Ct., no. 72-7377.

<sup>23</sup> Illinois Municipal League, Committee of Home Rule Attorneys, *Supplemental Report* (Sept. 22, 1972), pp. 12-14.

A class action involving all Illinois real estate brokers against the city of Urbana

As we have seen, the Seventy-seventh Illinois General Assembly attempted to enact a large number of bills which would have preserved state exclusivity in a wide range of governmental activities. Although the Chicago Democrats were able to kill many of these bills in committee in the Democratic-controlled Senate, this appears to be only a Pyrrhic victory, because the Democrats no longer control either house. Many felt that the legislature would declare certain existing functions to be of exclusive state concern. Others had hoped that localities would be able to experiment in previously traditional state activities and that preemptive measures would be introduced only when the results of these experiments were found to be detrimental to the state. However, this does not appear to be the sentiment of the majority of state legislators. The concept of home rule was not able to transcend the traditional lines of division within the state legislature.

#### SEVENTY-EIGHTH GENERAL ASSEMBLY

The first session of the Seventy-eighth Illinois General Assembly, meeting from January 10 to July 2, 1973,<sup>24</sup> also witnessed the introduction of numerous bills to preempt, limit, or deny powers and functions of home rule units. Again the legislature was closely divided. Only two major pieces of legislation were passed declaring exclusive exercise by the state of such powers and functions. No bill was passed which, in accordance with section 6(g) of article VII of the Illinois Constitution, either stated that a three-fifths vote was required or received such a ruling from the chair of the House or the Senate.

House Bills 1050 and 1313, aimed at home rule units, passed both houses of the legislature by a majority vote, under section 6(i). H.B. 1050 (P.A. 78-448) adds to the Open Meetings Act<sup>25</sup> the statement that the provisions of the act constitute minimum requirements for home rule units. Any home rule unit may enact an ordinance prescribing more stringent requirements. More stringent requirements than prescribed by statute may also be enacted by home rule units under H.B. 1313. H.B. 1313 (P.A. 78-458) provides that state laws requiring notice to be published or posted by a city or a county, or by an officer of a city or a county, shall apply to home rule as well as non-home rule units.

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separately and as representative of a class involving all Illinois municipalities was filed December 15, 1972 (*Johnson v. City of Urbana*, Champaign County Circuit Court, no. 72-C-945). The issues are similar to those in the *Evanston* case. The circuit court decision in *Evanston*, rendered July 23, 1973, was that Public Act 77-1818 is unconstitutional, while the decision in *Johnson*, rendered June 29, 1973, upheld the constitutionality of the act. Both cases have been appealed to the Illinois Supreme Court. — Ed.

<sup>24</sup> Most of the legislative activity on home rule in the first session of the Seventy-eighth General Assembly took place after this paper was written. This short concluding section has been added to bring the reader up to date. — Ed.

<sup>25</sup> Ill. Rev. Stat., ch. 102, secs. 41-44 (1971).

Among the unsuccessful pieces of legislation introduced to preempt powers or functions of home rule units not exercised or performed by the state, under section 6(g), were the following: S.B. 217, S.B. 566, and H.B. 345 (to amend the Municipal Code by adding sections 10-1-49 and 10-2.1-31 to the provisions dealing with civil service and boards of fire and police commissioners in order to make these provisions applicable to all municipalities, including home rule municipalities); S.B. 493 (to provide exclusive exercise by the state of the power to tax cigarettes and deny such power to all units of local government, including home rule units); H.B. 348 (to amend the Municipal Code by adding section 10-1-49 to the provisions dealing with civil service in order to make these provisions applicable to all municipalities, including home rule municipalities); H.B. 971 (to amend the Counties Act to make tax rate limitations applicable to home rule counties); and H.B. 1811 (to amend the Municipal Code by adding sections 10-1-49 and 10-2.1-31 to the provisions dealing with civil service and boards of fire and police commissioners in order to make those provisions applicable to municipalities under one million population). None of these bills passed both houses by a three-fifths majority vote.

Also introduced during the first session of the Seventy-eighth General Assembly was H.B. 911, similar to the tax freeze bill introduced in the Seventy-seventh General Assembly. Representative C. L. McCormick was again the chief sponsor. H.B. 911 would have frozen most 1974 and 1975 property taxes at 1973 levels for all local units of government, including home rule units. The bill was left in conference committee at the time of adjournment.

## HOME RULE REFERENDA IN ILLINOIS

SUSAN B. MACK

The lack of effective provisions dealing with local government was an important concern when the Sixth Illinois Constitutional Convention met to draft a modern constitution for the state. Many delegates felt that counties and municipalities needed expanded powers to fulfill their responsibilities in a modern, highly complex, and interrelated society. Guided by this concern and by the deliberations of the convention's Committee on Local Government, the delegates included several significant departures in the local government article of the new constitution. Potentially the most significant is home rule.

The term home rule is inexact. It summarizes an approach to the powers of local units and consequently to the balance between local autonomy and state sovereignty. Theoretically, by a decrease in the extent of legislative control, local units will be able to respond promptly and effectively to local problems. In Illinois, home rule is a specific grant of general power to (1) municipalities with populations over 25,000, (2) other municipalities by referendum, (3) counties with an elected chief executive officer (Cook County is the only county to qualify), and (4) other counties which elect by referendum to adopt this structural change.

The local government article of the 1970 Illinois Constitution states that a home rule unit may "exercise any power and perform any function pertaining to its government and affairs including but, not limited to, the power to regulate for the protection of the public health, safety, morals and welfare; to license; to tax; and to incur debt."<sup>1</sup> Furthermore, "powers and functions of home rule units shall be construed liberally."<sup>2</sup> This is an extensive grant of power to certain governmental units to deal with problems and situations of a local nature as needs arise.

Although they are extensive, home rule powers are not absolute. For example, the local government article also provides that a conflict between an ordinance of a home rule county and an ordinance of a municipality in that county shall be resolved in favor of the municipality within its juris-

<sup>1</sup> Art. VII, sec. 6(a).

<sup>2</sup> Art. VII, sec. 6(m).

diction. Further, the General Assembly retains the power to limit or preempt specific home rule powers.

There is another limitation, one which applies only to county home rule units. In addition to enhancing the powers of county government, the constitutional provisions have increased county responsibilities, notably the responsibility of providing for visible, responsible, and accountable leadership. This has been accomplished by requiring counties that would become home rule units to first institute the county executive form of government. Briefly, this structural change requires the reorganization of county government to separate the executive functions of the elected county executive from the legislative functions of the county board. The provisions are detailed in the County Executive Act.<sup>3</sup> The county executive would be elected at-large, thus allowing direct political control and accountability in the same manner that other executives such as the president, governors, and mayors are subject to control by their respective publics. Once elected, a county executive would perform the executive functions of the county, including preparation of the annual budget, appointments (with the advice and consent of the county board), execution of all county board decisions, preparation of an annual report to the county board, and approval and veto of county board actions. The board would thus be relieved of many managerial and administrative details, giving it time and opportunity to become a comprehensive, deliberative, and policy-making body.

#### **MUNICIPAL HOME RULE REFERENDA**

In the short period of time since the adoption of the 1970 Illinois Constitution, home rule has been an important concern whenever local government is discussed. As of summer 1973 there were one home rule county and seventy-two home rule municipalities. Fifty-nine of these municipalities became home rule automatically when the constitution went into effect because they had populations of over 25,000 each. Six municipalities have become home rule subsequently through normal population growth as verified by special censuses (Carbondale, Glenview, Hoffman Estates, Naperville, Schaumburg, and South Holland). During the period from November 1, 1971, to April 30, 1973, thirteen municipalities of less than 25,000 population attempted to become home rule by referenda (see table 1). Of these referenda, six were unsuccessful. They were held in Arthur, Forest View, Lincolnshire, Long Grove, Stickney, and Worth. Successful referenda were held in Bedford Park, Countryside, McCook, Mound City, Norridge, Rosemont, and Stone Park.

Municipal home rule referenda are dependent on implementing legislation as well as on constitutional authorization. Section 28-4 of the Election

<sup>3</sup> Ill. Rev. Stat., ch. 34, sec. 701 et seq. (Supp. 1972).



TABLE 1. MUNICIPAL HOME RULE REFERENDA

Municipality (County)	1970 Population	Yes (%)	No (%)	Date
I. Successful Referenda				
Bedford Park (Cook)	583	254 (88)	36 (12)	Dec. 1971
Countryside (Cook)	2,888	598 (65)	317 (35)	Nov. 1972
McCook (Cook)	333	165 (91)	17 (9)	Nov. 1971
Mound City (Pulaski)	1,177	130 (70)	56 (30)	Apr. 1973
Norridge (Cook)	16,880	2,387 (77)	710 (23)	Apr. 1973
Rosemont (Cook)	4,360	229 (76)	72 (24)	Jan. 1972
Stone Park (Cook)	4,451	206 (73)	78 (27)	Dec. 1972
II. Unsuccessful Referenda				
Arthur (Douglas-Moultrie)	2,214	161 (42)	219 (58)	Mar. 1972
Forest View (Cook)	927	181 (33)	361 (67)	Nov. 1972
Lincolnshire (Lake)	2,531	255 (40)	381 (60)	Aug. 1972
Long Grove (Lake)	1,196	204 (49.5)	208 (50.5)	Apr. 1973
Stickney (Cook)	6,601	375 (29)	904 (71)	Dec. 1972
Worth (Cook)	11,999	494 (47)	557 (53)	Apr. 1972

Code ("Referendums required by Constitution in respect to units of local government")<sup>4</sup> sets forth the requirements for all referenda authorized by the local government article except for those provided for separately by the County Executive Act. Under this new section of the Election Code, a municipal home rule referendum may be initiated in one of two ways: (1) by resolution of the governing board of the local unit, or (2) by filing with the clerk of the local unit a petition signed by registered voters equal to 10 percent of the number who voted in the last general election in the unit. The governing body then provides for submission of the measure to the voters at any general, regular, or special election, but not later than the first general election occurring at least seventy-eight days after the adoption of the resolution or the filing of the petition. Both notice and ballot form follow standard procedures specified in other sections of the code. As with county home rule, referenda for municipal home rule cannot be submitted to the voters more than once in any twenty-three-month period.

In practice, municipalities favor the resolution method of placing the proposition on the ballot. Only in McCook and Bedford Park did citizens take advantage of the petition procedure. In Bedford Park a petition was filed signed by 74 percent of the registered voters, according to statistics from the office of the village clerk. Most municipal home rule referenda have been presented to the voters at special elections. Often this was the only question presented at that particular time.

Although conditions surrounding each referendum differed, several

<sup>4</sup> Ill. Rev. Stat., ch. 46, sec. 28-4 (1971).

common themes are evident. These can be illustrated by examining several referenda as miniature case studies. The information which follows was gathered from newspaper accounts and from interviews with local officials.

**ARTHUR.** (population 2,214) Arthur, one of the two municipalities outside the Chicago area to hold home rule referenda, failed to adopt home rule by a vote of 219 to 161. Home rule was presented to the voters of the village in March 1972 as a joint proposal with a property tax increase to provide ambulance service for the community and surrounding areas. Voters "split" their ballots. Home rule was defeated and the ambulance proposal passed. According to village officials, ignorance and poor communication were responsible for the defeat. Although the *Arthur Graphic-Clarion* ran a two-part series entitled "What Is Home Rule?" even the village president admitted that he was unsure what effect home rule would have on Arthur. There was virtually no campaign, and in various news reports following the defeat no spokesmen could be found to represent the successful opposition.

**LINCOLNSHIRE.** (population 2,531) In August 1972 a home rule referendum was defeated in Lincolnshire. The vote was 381 to 255. According to the mayor, home rule status was expected to provide new sources of revenue for the municipality. Such possible sources included theater, hotel, liquor, cigarette, and sales taxes. There was no campaign and no opposing spokesmen were cited or identified.

**COUNTRYSIDE.** (population 2,888) A home rule referendum held in December 1972 was successful in Countryside. The vote was 598 to 317. The village mayor noted that, although home rule gives a municipality broader taxing powers, the main reason that the measure should be passed was to give Countryside a tool to defend itself against encroachment from Cook County. "There is no telling what the county may try to tax next." The measure was opposed by some residents who feared that under home rule the availability of the taxing power would encourage its use.

**ROSEMONT.** (population 4,360) The Rosemont home rule referendum in January 1972 was successful by a vote of 229 to 72. A resolution had been passed unanimously by the governing board on the recommendation of the mayor. The reasons for the referendum were the need for other sources of revenue and the desire to avoid certain restrictions of the Cities and Villages Act. The governing board felt that special conditions in Rosemont required measures which could not be taken by non-home rule units. Rosemont is the site of many major hotels and motels which serve O'Hare Field and has a large transient population on a daily basis, usually numbering between 25,000 and 30,000. This necessitates disproportionate expenditures for public services. For example, Rosemont is the only municipality of comparable size in Illinois with a full-time, paid fire department. The advantages of home rule were presented as (1) greater flexibility in long-term financial arrange-



ments, and (2) eased taxation and licensing restrictions. The measure was publicized at several public meetings attended by a total of about one hundred people, in newspaper accounts, and at open village board meetings. Some concern was felt by the public employees, but no organized opposition was advanced.

**STONE PARK.** (population 4,451) In December 1972 a successful home rule referendum was held in Stone Park. The vote was 206 to 78. Village officials were primarily interested in regaining taxing powers which had been lost with the adoption of the 1970 constitution. Revenue from the taxation of three mobile home parks had been lost, and home rule would make possible reimposition of the tax. In addition, village officials feared that Cook County zoning and building codes would lead to high-rise apartment buildings in the village. Officials also wanted to enter into joint purchasing agreements with Northlake and Melrose Park and hoped that home rule would enhance that power. There was no campaign on the issue of home rule and no visible opposition.

Although it is still too early to draw any firm conclusions concerning the pattern of home rule adoption, it is possible to make some general comments. To date, successful referenda seem to indicate that home rule adoption will be primarily a suburban, and more specifically a Cook County, phenomenon. This has implications which would merit further study. For example, the activities of one home rule unit (in this case, Cook County) may have a "snowball" effect leading directly to the formation of more home rule units.

It is also interesting to note the relatively small size of the municipalities which have sought to become home rule units by referendum. Most have populations of less than 5,000 and some are considerably smaller (see table 1). The constitutional convention granted home rule to municipalities over 25,000 population in the belief that home rule powers were most appropriate to units of such size. It was felt that home rule could help these units deal with problems of urbanization that accompany increased size. In practice, however, there appears to be a group of small municipalities which feels that home rule is the best, and sometimes the only, means of dealing with their special circumstances. One traditional goal of home rule has been to grant local autonomy in situations unique to given communities. Further experience in home rule may demonstrate that small units need home rule at least as much as do larger ones. In fact, home rule may be best suited to the smaller units because home rule power may tend to foster fragmentation in the solving of "urban" problems, many of which could be dealt with more effectively through increased intergovernmental cooperation within metropolitan areas.

The municipal home rule referenda held to date illustrate the validity of several of the truisms of political science election literature. First, there

is a very low public awareness of and interest in local government. This is evidenced in municipal home rule referenda by low turnout rates, lack of opposition to what has in other contexts — debates at the constitutional convention and county home rule referenda campaigns — proven to be a controversial issue, and lack of real campaigning. Second, local officials generally take the initiative in local affairs, especially in extremely small municipalities. Third, the issue of taxation is complex. Presented in a positive light, this issue may successfully mobilize support rather than inevitably being linked to opposition to home rule.

The nature of the opposition is also interesting, especially in light of the experiences in county home rule referenda (see below). There was almost no opposition to home rule in the municipal campaigns. Some opposition was expressed over the implications of home rule for higher taxation, and to a lesser extent about the uncertainties of pensions for public employees. Opposition on the basis of these concerns, however, was neither organized nor intense. The most effective obstacle to a successful referendum may have been public uncertainty. Unfortunately, this is an extremely difficult variable to measure in a political study.

In summary, municipal home rule referenda have been sporadic occurrences, characteristically responses to local conditions which cannot be dealt with in any other manner. Additional referenda are likely to be held, but no clear patterns are discernible at this point.

**COUNTY HOME RULE REFERENDA**

The home rule grant is merely an option for Illinois counties other than Cook. In 1972, nine counties tried to take advantage of this option. In all nine counties the home rule question was defeated by large margins (see table 2). The significance of these figures, however, is not immediately apparent.

Before a county could decide whether to have an elected chief executive officer and thus to become a home rule unit, implementing legislation had to be enacted. As provided in the County Executive Act, the question can be placed on the general election ballot if (1) the county board adopts a resolution to that effect, or (2) a petition is filed with the clerk of the circuit court signed by 2 percent of the registered voters in the county or five hundred registered voters, whichever is less. The referendum is to be expressed on the ballot in substantially the following manner:

Shall the County of _____	Yes _____
become a Home Rule County and	
establish the County Executive	
form of government?	No _____

TABLE 2. COUNTY HOME RULE REFERENDA  
(all held March 21, 1972)

County	1970 Population	1972 Registered Voters <sup>5</sup>	Number Voting on Home Rule	Yes(%)	No(%)
DeKalb	71,654	33,084	13,044	4,161 (32)	8,883 (68)
DuPage	491,882	232,437	83,833	23,487 (28)	60,346 (72)
Fulton	41,890	26,404	9,559	1,617 (17)	7,942 (83)
Kane	251,005	104,190	32,611	8,459 (26)	24,152 (74)
Lake	382,638	165,738	48,063	14,977 (31)	33,086 (69)
Lee	37,947	18,694	8,183	2,013 (25)	6,170 (75)
Peoria	195,318	84,389	37,777	15,027 (40)	22,750 (60)
St. Clair	285,176	109,920	27,668	2,609 (9)	25,059 (91)
Winnebago	246,623	109,598	36,324	10,149 (28)	26,175 (72)

If a majority of those voting on the question vote favorably, the county board then proceeds to establish the county executive form of government. Essentially this involves providing at the next general election for the election of a person to fill the new office. The newly elected chief executive would then take office the first Monday in December following his election, and county home rule would be achieved.

In four counties — DeKalb, Kane, Peoria, and St. Clair — referenda were initiated by petition. Since this method of initiation is not directly related to the respective margins of defeat, additional factors must be found for the nine defeats of home rule.

While the election defeats appear to be overwhelming, they were dealt to home rule by a relatively small number of electors. This may in part be the inevitable result of timing. The referenda were held at a primary election and it is likely that the election results exaggerate the extent of anti-home rule sentiment. If the referenda had been held at the November general election, as all future home rule referenda for counties will be, the results would probably have been less one-sided.

In contrast to general elections, especially those in presidential election years, primaries are characterized by low turnout rates. The turnout rates were low in all nine counties, and in each the option of home rule was defeated by a small group of voters, sometimes numbering less than 10 percent of the county's population (see table 2). In the St. Clair county referendum, where home rule was defeated by the largest margin, only one-fifth of the county's registered voters voted against the measure.

People who participate in primary elections tend to be more partisan than those who participate in general elections. Thus the audience for politi-

<sup>5</sup> Figures supplied by county clerks.

cal information in primary elections is largely composed of those potential voters who are oriented toward political parties, candidates, and issues.

The 1972 primary election featured hotly-contested races for the Democratic gubernatorial nomination and for delegates and preference votes in the Democratic presidential primary. The main focus of attention was far removed from the home rule issue. As could have been anticipated, political information about the candidate races had an overwhelming advantage in gaining public attention. In the newspapers published in counties voting on the home rule measure, information about the candidates overwhelmed information about home rule in volume and preferred page position. Home rule articles failed to be competitive; they were less exciting and less interesting.

This competitive disadvantage had important implications for the initial impact of a little-understood issue during the campaign. First, it was relatively easy to entirely overlook home rule information. Information must be easily accessible if it is to have any impact at all. A second implication was that because home rule was a nonpartisan issue it did not have the advantages of a party label to encourage public attention. It is possible that a partisan campaign on home rule would have increased turnout by increasing the visibility of the issue.

A characteristic of primary elections helps to explain the wide margins in these elections. The character of the electorate differs markedly in primary and general elections. In a primary election, where the turnout is low, the people who stay at home are those who are less interested, less involved, and less partisan. In other words, people vote in a primary because they have a good reason to do so, and one of the best-known reasons is to vote *against* something. Voters who oppose a measure are more easily motivated to vote and thus turn out in proportionately greater numbers than voters who favor or are neutral to the same measure. In practical terms, this means that defeating home rule was easier than passing it.

The arguments used to motivate opposition often appealed to fears, uncertainties, and negative feelings in general. One such argument was that home rule would give the counties too much power. Another was that the county executive would actually become a county "dictator," and develop yet another unresponsive and irresponsible bureaucracy. These arguments reflect the generalized distrust of government that is a recurrent theme in American political campaigns.

Some statements called for limitations to control local power, suggesting that home rule would be more palatable once such limitations had been established by the General Assembly. The limitation most often called for was a check on the ability of home rule counties to license occupations and businesses. This demand was the focus of attention for several of the groups involved in the campaign against home rule. Two spokesmen claimed they

were in favor of home rule with this one exception and urged delay of adoption until a future time. They opposed home rule in the referenda as a lobbying technique to demonstrate to the General Assembly their support for the speedy passage of House Bill 3636 (now Public Act 77-1818),<sup>6</sup> which declares the regulatory power under certain designated occupational licensing or registration laws to be exclusively a state function.

Other arguments against county home rule followed similar lines of thought. Home rule was opposed as the first step to “metro” government. Opponents also argued that if home rule were passed at that time and party county executive candidates not elected at the same primary election, this would be an open invitation to machine control of the county. The example of Cook County was also used in an attempt to take advantage of the downstate ambivalence toward the Chicago metropolitan area.

These arguments undeniably had an impact on the voters participating in the primary election. The main thrust of the anti-home rule campaigns, however, centered on higher taxes and higher costs of government. Opponents equated home rule with unlimited and extravagant county taxing and spending. Altered debt limits and the ability to incur debt without voter approval were mentioned, but the major concern was specifically with taxes — they would be increased, and increased without voter approval. Observers familiar with home rule have described all nine referenda defeats as taxpayers’ revolts. Negative feeling about the tax issue was enhanced by the competitive partisan races in the March primary election. Candidates then were talking about such topics as shoebox scandals and the high cost of corruption in state government, the high cost of living, and high and inequitable levels of taxation. Reiteration of these points probably reinforced the impact of the argument that home rule would bring higher taxes.

A comparison of the kinds of arguments pro and con the home rule issue will yield a better understanding of the failure of the referenda. Organized opponents of home rule ranged from occupation-oriented groups such as the Waukegan Board of Realtors and the Illinois Tobacco Dealers Association, community organizations such as the Belleville Chamber of Commerce, to ad hoc groups — notably STOP (Stop Taxing Our People), which was active in several counties. There was also some opposition from governmental units, although those most directly affected — the county boards — were conspicuous by their silence on the issue.

The anti-home rule position was covered comprehensively in the newspapers of the nine counties involved. The National Farmers Organization, for example, mounted a vigorous campaign in St. Clair County, the publicity for which included the following policy statement:

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<sup>6</sup> Ill. Rev. Stat., ch. 127, sec. 901-03 (Supp. 1972).

We opposed adoption of the new Illinois Constitution because we believed that it would pave the way for unlimited taxing power, crazy licensing and give-away of our tax money. . . .

We believed we were right then, and we believe that we are right now in opposing this travesty on true home rule.

We are convinced that a vote for home rule would be a vote for centralized government and dictatorship, which certainly we do not want. But a vote against home rule will be a vote for decentralized government and freedom.<sup>7</sup>

The proponents' point of view was typified by this statement of the League of Women Voters:

Anticipating that home rule would result in better government by reforming county governmental structure, the League of Women Voters of Lake County strongly supports the approval of Home Rule for Lake County. The league feels that the taxing power of home rule counties will make county officials more visible and responsible to the electorate. The separation of legislative and executive powers that will come about with electing a county executive, the concurrent checks and balances that these branches of government will have upon one another, and the subsequent acquisition of home rule powers for Lake County (whereby the county can be creative and innovative) are strongly supported by the league.<sup>8</sup>

In addition to the League of Women Voters, information favorable to home rule came generally from an assortment of ad hoc committees such as Citizens United for Good Government (Winnebago County), but in other counties there was no organized group support at all.

The absence of organized support is all the more noteworthy because the supporters of home rule were responsible for placing the issue on the ballot. The initiation procedure can bear a large part of the blame. It takes a resolution of the county board or a petition signed by 2 percent of the registered voters or five hundred voters, whichever is *less*, to place the question of county home rule on the ballot. Evidently excitement and enthusiasm at having passed a new constitution motivated the proponents to put the proposal before the voters without first ascertaining the level of support. The ease with which the home rule question can be placed on the ballot is entirely unrelated to the degree of organization, debate, education, and plain hard work needed to pass the measure. For example, in St. Clair County approximately nine hundred signatures initiated the referendum, but there was an almost complete absence of support for the measure. In fact, only 2,609 voters supported home rule in the referendum.

In short, the proponents were unsuccessful because they failed to recognize the essentially political and practical nature of the problem. They lacked the support of organized community groups and political parties. Furthermore, their efforts were largely uncoordinated. In literature and

<sup>7</sup> *Belleville News-Democrat*, Mar. 13, 1972.

<sup>8</sup> *Libertyville Independent Register*, Mar. 2, 1972.



statements they stressed only the procedural and structural aspects of home rule, ignoring issues and substantive local problems. Finally, they overestimated public understanding of the issue.

Not only was home rule defeated in all nine counties where it appeared on the ballot, but the margins of defeat were large. The long-term effects, however, may be more important than the immediate fact of defeat. The proponents entered the fray without adequate support or preparation to wage a competitive campaign, especially in terms of the extensive prior public education required for reform efforts. Consequently, events that were initiated by home rule advocates educated the public *against* home rule. Because of the meager support for the measure, there was virtually no rebuttal to the emotional, misleading, and inaccurate arguments and statements of the opponents. Thus many voters' first exposure to the concept of county home rule was overwhelmingly negative. Followed by the uniformity of the defeats, this first negative exposure may constitute an unfortunate precedent, inhibiting future adoption of county home rule.

The situation should not discourage additional attempts at county home rule referenda. All future county referenda will be held at November general elections. It is therefore to be expected that many of the conditions leading to the defeats in 1972 will not be operating. Proponents of home rule may then look forward to a greater chance of success.





**HOME RULE AND LOCAL GOVERNMENT FINANCE:  
AN ECONOMIST'S PERSPECTIVE**

**ROBERT N. SCHOEPLIN**

Illinois is increasingly an urban state, and Illinois residents in metropolitan areas are confronted by problems that are a consequence of the urbanization process. The concentration of people and productive activities magnifies the problems inherent in such aspects of urban life as public health, safety, housing, transportation, pollution, land use, sewage and waste disposal, manpower, and education. The demand for expanded and refined governmental services increases, straining the finances of urban units. Three problems in metropolitan areas have a particularly dire effect on the finances of governmental units in these areas: the fragmentation of government in a metropolitan setting, the mismatch between citizen needs and fiscal resources within the numerous local governments, and the frustrating legal precedent known as Dillon's Rule.

Metropolitan areas historically have been fragmented or balkanized into numerous independent and overlapping units of local government. These local governmental units may provide a greater variety of public services to their constituents than would one central metropolitan government, but many critical social concerns in a metropolitan setting transcend local political boundaries and may engulf the entire urban area. Illinois has more units of local government than any other state, and attempts to coordinate efforts among units to satisfy social needs are exceedingly difficult. Of the nine designated standard metropolitan statistical areas (SMSAs) in the state, Chicago is the most populous, with 62.8 percent of the total state population. The Chicago SMSA encompasses six counties containing 250 municipalities, 114 townships, 316 school districts, and over 400 special districts. The other SMSAs also are fragmented into many local governments on a scale reflecting their populations. The Peoria SMSA, for example, encompasses three counties with 45 municipalities, 20 townships, 62 school districts, and 72 overlapping special districts.

The problems of resolving social needs within fragmented urban areas are intensified by a mismatch between local fiscal resources and citizen needs among the many units of local government. The need for certain local public

services varies among households. "High-cost" citizens are individuals who require many local government services, regardless of government's capacity to fund such services. The elderly, the very young, the unemployed, and the poor are categories of high-cost citizens who consume a disproportionate share of local public services. High-cost citizens have become increasingly concentrated in sections of central cities and in isolated municipal and unincorporated pockets of poverty throughout the rest of the metropolitan area. The balkanization of urban areas also has resulted in wealthy enclaves among the governmental units. The Advisory Commission on Intergovernmental Relations has noted that "because the concept of local fiscal disparities is of necessity a relative matter, the political splintering of Urban America along income and racial lines produces its share of municipal winners as well as losers."<sup>1</sup>

The third problem of urban public finance — that of Dillon's Rule of restrained local government powers — has been particularly frustrating to central cities in their efforts to cope with urban problems. The states in most instances have reserved for themselves the broad-based taxes that generate significant revenues, leaving municipalities and counties in the uncomfortable position of having to bargain in the state political arena for authorization to introduce new local taxes.

Three approaches have recently been put forth nationwide to mitigate the financial problems of urban areas. First, the federal and state governments have been urged to assume primary or complete fiscal responsibility for certain public services such as welfare and education. Second, states have been urged to share tax revenues with local governments. Third, the federal government recently has adopted a general revenue-sharing program to redistribute a specified portion of federal tax receipts back to municipalities, counties, and other general purpose units of local government.

Delegates to the Sixth Illinois Constitutional Convention were aware of the crucial importance of government finance to meaningful home rule and to the balance of political power blocs. Delegate John Wenum as a representative for the Committee on Local Government Majority Report spoke to the first element:

[Revenue power] is such . . . an overriding concern for meaningful home rule to be implemented. Lacking revenue sources — lacking a protection of revenue sources — home rule, which presupposes in most instances that there will be a greater level of action, more functions, more services, than probably were the case before, there is only one way that the higher level of functions and services can be supported and that is by having some additional revenue powers.<sup>2</sup>

<sup>1</sup> Advisory Commission on Intergovernmental Relations, *Urban America and the Federal System* (Washington, D.C.: GPO, 1969), p. 12.

<sup>2</sup> Illinois, Sixth Constitutional Convention, *Record of Proceedings, Verbatim Transcripts* (Springfield, 1972), IV:3060.

Proposals for resolving the fiscal problems of urban governments must relate both to the nature and magnitude of the actual situations if meaningful progress is to be made. Local political fragmentation and the historical constraints of Dillon's Rule provide a setting for a fiscal dilemma. The magnitude of the fiscal crisis is determined largely by the extent of the fiscal mismatch between local citizen needs and local fiscal resources. We will examine this fiscal mismatch issue at some length, to ascertain whether local government fiscal problems in reality are a tempest in a teapot, or whether the suggested approaches to solution in fact are adequate for the task.

#### **THE MISMATCH OF CITIZEN NEEDS AND FISCAL RESOURCES: DECREASING OR ACCELERATING?**

The largest segment of high-cost citizens are those individuals who need local public services but who do not participate directly in the economic productivity of the community. These are the very young, the very old, and the unemployed, all of whom tend to have inadequate personal wealth to satisfy basic needs. These high-cost citizens are not distributed in the same percentile numbers among municipalities throughout the Chicago metropolitan area, but rather tend to be concentrated in the core city. The nature of this fiscal mismatch in urban centers was documented in a 1968 study by Philip Meranto, using data applicable to the mid-sixties.<sup>3</sup> In that year, the fiscal disparities between the central city and the suburban municipalities as a group were striking.

Do recent trends and developments suggest whether local government fiscal problems in urban areas nationwide and in Illinois are accelerating or are being resolved? It is difficult to generalize from recent experiences of central cities and suburbs on a national scale. There is considerable diversity among metropolitan areas in the extent to which the economic and social characteristics of central cities differ from the remainder of their urban areas.<sup>4</sup> One can look specifically to the Chicago metropolitan area, however, to discern changes in the concentration of social problems and in the distribution of tax revenues there.

Let us examine the most recent trends in the Chicago area for each of the basic categories of high-cost citizens. Children are high-cost citizens because of their need for public education, which generally is over one-half of total government expenditures at the local level. In the fifties and early sixties the outlying suburbs had the image of being populated by young couples with school-age children. Indeed the 1960 census affirmed that there

<sup>3</sup> Philip Meranto, "Metropolitanization: Implications for State-Local Finance," in Glenn W. Fisher, ed., *Illinois State and Local Finance* (Urbana: Institute of Government and Public Affairs, University of Illinois, 1968), pp. 13-21.

<sup>4</sup> Marjorie C. Brazer, "Economic and Social Disparities between Central Cities and Their Suburbs," *Land Economics* 43 (August 1967):294-302.

was almost a 12 percent difference between Chicago and the suburbs in the proportion of children in the population. The 1960 census reported that children age sixteen and under represented 24.6 percent of the total population of the city of Chicago. For the SMSA outside Cook County the comparable figure was 36.2 percent.<sup>5</sup> The 1970 census indicates that while children as a percent of total population in the five outlying counties (Du Page, Kane, Lake, McHenry, and Will) had declined slightly to 35.9 percent, children age sixteen and under in Chicago's population increased to 30.4 percent.<sup>6</sup>

The composition of the school-age population is critically important for local education costs. Educators have demonstrated that disadvantaged children from poverty households necessitate a greater than average investment in fiscal resources to sustain achievement. In evaluating the differential costs of education nationwide, the National Education Finance Project estimated that the cost weighing of disadvantaged, or culturally deprived, children ranges from 1.6 to 2.9 times that of a normal child.<sup>7</sup> The federal government in 1965 initiated a categorical aid program—identified as Title I compensatory education assistance—to school districts serving children from poverty level households.

The number of children from poverty level households as a basis for distributing federal aid initially was determined from 1960 census data. The school district that comprises the city of Chicago recorded 53,091 children eligible under Title I in school year 1966–67, the second year of the program.<sup>8</sup> These children represented 10.5 percent of the average daily attendance in Chicago schools for that year. The comparable ratio of Title I school children eligible to average daily attendance in school districts comprising the five suburban counties was 3.3 percent for the same year.

The basis for identifying eligible children for Title I assistance has been updated and liberalized in the ensuing five years. The new data indicate that the relative fiscal position of the core city school district has deteriorated significantly. The Chicago school district now reports 209,131 school-age children eligible for Title I assistance, or 43.3 percent of average daily attendance for school year 1971–72. The percentage of children eligible for Title I in the outer five counties has risen only to 7.1 percent. Because the

<sup>5</sup> U.S., Bureau of the Census, *Census of Population: 1960. General Population Characteristics: Illinois* (Washington, D.C.: GPO, 1961), tables 20 and 27.

<sup>6</sup> U.S., Bureau of the Census, *Census of Population: 1970. General Population Characteristics: Illinois* (Washington, D.C.: GPO, 1971), tables 24 and 37.

<sup>7</sup> William P. McLure and Audra May Pense, *Early Childhood and Basic Elementary and Secondary Education: Needs, Programs, Demands, Costs*, National Education Finance Project, Special Study No. 1 (Urbana: Bureau of Educational Research, College of Education, 1970), table 16, p. 96.

<sup>8</sup> Illinois, Office of the Superintendent of Public Instruction, Exceptional Children Division.

federal government pays only a portion of the incremental funds necessary to support compensatory students according to cost differentials (and such federal support is in jeopardy at this time), changes in the relative weights of compensatory students are an indicator of the magnitude of fiscal resource requirements faced by core city schools. The Chicago school district is a separate fiscal entity from the city of Chicago. The district's property tax receipts are supplemented by the state through a foundation-grant equalization formula. Nonetheless, the Chicago Unit School District and the city of Chicago both generate tax revenues from the same property base. The increased fiscal plight of the school district therefore affects the tax potential of the city adversely.

The elderly are another segment of high-cost citizens: what is their distribution over the metropolitan area? In 1960 Chicago had a slightly larger proportion of residents over age sixty-four than did the five suburban counties (9.8 percent to 7.3 percent). Although the total population of Chicago declined during the sixties, the absolute number of elderly increased. The elderly now comprise 10.6 percent of Chicago residents, while in the outlying five counties residents over age sixty-four have declined to 6.9 percent of total population.<sup>9</sup> Thus, in 1970 the relative impact of the elderly in Chicago is one and one-half times that of the suburban counties.

The distribution of the chronically unemployed throughout the Chicago metropolitan area presents a formidable problem to local governments. In most communities the numbers and demographic composition of the unemployed are correlated with local expenditures for public health, welfare, safety, housing, and other public programs. In the mid-sixties the unemployment rate in central cities nationwide and in Illinois was twice that of the suburban rings.<sup>10</sup> This situation remained unchanged in 1970; the 9.6 percent unemployment rate in Chicago was over two and one-half times the 3.6 percent rate for the five suburban counties.<sup>11</sup> The aggregate Chicago SMSA has maintained a lower rate of unemployment than the state or the nation throughout the underemployment period beginning in 1966.<sup>12</sup> As statewide and national employment improved during 1967, unemployment in the core poverty areas of Chicago remained unchanged. The modest decline that was realized in U.S. central cities occurred almost exclusively among whites.<sup>13</sup> The overall 1970 Chicago unemployment rate of 9.6 percent

<sup>9</sup> U.S., Bureau of the Census, *Census: 1970. General Population Characteristics: Illinois*, table 16.

<sup>10</sup> Meranto, "Metropolitanization," p. 16.

<sup>11</sup> U.S., Bureau of the Census, *Census of Population: 1970. General Social and Economic Characteristics: Illinois* (Washington, D.C.: GPO, 1972), table 121.

<sup>12</sup> Illinois, Employment Service, *Area Manpower Review: Chicago SMSA* (Springfield, July 1972), p. 5.

<sup>13</sup> Paul M. Ryscavage and Hazel M. Willacy, "Employment of the Nation's Urban Poor," *Monthly Labor Review* 91 (August 1968):15-21.

was the weighted sum of 6.4 percent unemployment for whites and 11.7 percent for blacks. Moreover, whites also had a jobless rate of 14.3 percent for youths aged sixteen to twenty-one years not in school; the comparable rate for black youths in Chicago was an astounding 35.8 percent.

Between 1966 and 1972 the total number of persons receiving all forms of public assistance in Illinois rose two and one-half times.<sup>14</sup> In 1966 throughout the state an average of 37 persons per 1,000 population received some category of public assistance. The Cook County figure for that year was 48 persons per 1,000, and the average for the five suburban counties was 8 per 1,000 population. In the last six years these suburban counties experienced an increase in public assistance rolls to 29 persons per 1,000 population, but in Cook County in October 1972 the average had increased to 129 persons per 1,000 population receiving some form of public assistance.

To answer the question posed earlier — Is the mid-sixties mismatch between social service needs and fiscal capacity abating? — the answer is clearly no. The figures on all groups of high-cost citizens — school-age children, the aged, the unemployed — show that concentrations of these groups are growing in the central cities at a faster rate than they are growing in the suburbs.

The fiscal problems arising when high-cost citizens are concentrated in a few municipalities within a metropolitan area might be mitigated if state and local fiscal resources were reallocated to these social service crisis areas. That is, the federal government or state government could mitigate inequities among local governmental units in the provision of local public services by assuming a greater fiscal responsibility for specific services. The administration of the programs, however, would remain essentially with local government officials. Such a shift in resources has occurred to a moderate extent in Illinois during the past six years. In 1966–67 the state provided the Chicago Unit School District \$86.8 million in aid, or 19.0 percent of current expenses, through the foundation support program. State support to all common schools averaged 26.7 percent of total state and local funds for that year. By 1972–73 state support to the Chicago school district had increased to \$228 million, or 34.7 percent of per pupil current operating expenses. During the same period the state's portion of total state and local funds for all common schools increased to 41.2 percent.<sup>15</sup> The state also has expanded

<sup>14</sup> Illinois, Department of Public Aid, *Public Aid in Illinois* (Springfield, November 1966), p. 28. *Monthly Exhibits for October 1972* (Springfield, December 1972), table 1.

<sup>15</sup> Illinois, Office of the Superintendent of Public Instruction, Office of Research. Also, *Annual Statistical Report of the Superintendent of Public Instruction, 1966–67* (Springfield, 1971), tables 3, 15, 16. The Chicago Unit District public count used is Average Daily Attendance.



functional grants to other special purpose districts and to general purpose local governments for specific social programs.

The core city's needs have outstripped permitted tax sources, however, necessitating continued reliance on the local property tax. Chicago raised \$80 million through general property taxes in 1960, or 44.0 percent of revenue for the Corporate Purposes Fund. General property tax receipts had increased by 125 percent in the ensuing ten years, to \$181 million in 1970, yet these increased revenues represented an almost stable 45.6 percent of total Corporate Purposes Fund receipts for 1970.<sup>16</sup>

The Illinois legislature in 1969 adopted a state income tax that included provisions to share one-twelfth of ensuing income tax revenues with municipalities and counties.<sup>17</sup> This important legislation gave Illinois almost a three-year headstart over the federal government in general revenue sharing to Illinois cities and counties. The funds are redistributed on a strict per capita basis regardless of concentrations of high-cost citizens. Chicago's receipts from the shared income tax totaled \$23.8 million, or 6.3 percent of taxes collected for the Corporate Purposes Fund during calendar 1971. These shared revenues also represent 5.4 percent of revenues from all sources to the Corporate Purposes Fund in 1971. The city of Chicago's receipts from the state income tax were \$25.1 million, or 6.3 percent of total Corporate Purposes Fund receipts in 1970; the decline in absolute and relative contributions of these revenues between 1970 and 1971 largely reflects the decline in income tax receipts during an economic recession.

In October 1972 the federal government also passed a revenue-sharing program for local general purpose units of government.<sup>18</sup> The State and Local Fiscal Assistance Act of 1972 was retroactive to January 1, 1972. The federal funds for the initial five years are a nominal amount, averaging about 5 percent of total operating budgets for these general purpose local government units in Illinois. The federal revenue-sharing program, unlike the state income tax sharing scheme, is based on three factors for fund distribution which are sensitive to concentrations of high-cost citizens. Monies under the federal program depend on a local government's population, local tax effort, and average per capita income. The federal program in no sense guarantees additional monies because of more intensive social problems in a particular community, but to the extent that a municipality has a sufficient number of poverty households to reduce average per capita income appre-

<sup>16</sup> Chicago Home Rule Commission, *Report and Recommendations* (Chicago: University of Illinois at Chicago Circle, 1972), p. 378. Also City of Chicago, *Annual Report of the Comptroller*. Select years.

<sup>17</sup> Ill. Rev. Stat., ch. 120, secs. 1-101 (1971).

<sup>18</sup> 31 U.S.C., sec. 1221 et seq. (Supp. II, 1972).

ciably and is trying through local tax effort to cope with its problems, it will receive additional federal revenue-sharing funds. Chicago's share for calendar 1972 is estimated at \$61 million, or about 13 percent of the city's current Corporate Purposes Fund budget.<sup>19</sup>

Both state and federal revenue-sharing programs add a new dimension to the finances of local general purpose governmental units. Whatever new revenue sources are permitted home rule units under the 1970 state constitution, these sources can be viewed as supplements to receipts from two revenue-sharing programs. We must remember, however, that local government finance deals with social problems that are not the responsibility of general purpose governments or of specific municipalities. In the past Congress has recognized the metropolitan-wide nature of such problems as health, transportation, compensatory education, and housing. In the last session Congress considered a special purpose form of revenue sharing, but the Community Development Revenue Sharing Program was not approved. At the time of this writing the Nixon administration and Congress are in conflict over the fate of federal categorical assistance programs in urban and rural areas. There is great uncertainty over the form and magnitude of federal funding in the immediate future for metropolitan-wide social services. Without such attention to specific problems, any new fiscal powers granted home rule municipalities will not resolve the metropolitan plight of jurisdictional mismatches between need and fiscal resources.

#### NEW FISCAL OPPORTUNITIES AND CONSTRAINTS FOR HOME RULE UNITS

Given the magnitude and directions of change in urban social needs, how relevant and appropriate are the fiscal powers granted to Illinois home rule units in the 1970 constitution? Delegates to the Sixth Constitutional Convention acknowledged the critical nature of urban problems within the state and the need for broadened local powers to meet these problems. In its Majority Report the convention's Committee on Local Government stated:

The Committee believes local government should be strengthened because it is closer to the people it serves than are other forms of government and, as a result, on balance is likely to be more responsible to the citizenry, more sensitive to community needs and more efficient and effective in meeting those needs.<sup>20</sup>

Yet the specific committee recommendations and subsequent floor debate reflected the political nature of the convention and the political interests of the respective "nonpartisan" delegates. The local government article as pro-

<sup>19</sup> Illinois, Commission on Intergovernmental Cooperation, *Revenue Sharing Updated* (Springfield, 1973).

<sup>20</sup> Ill., Sixth Const. Conv., *Record of Proceedings, Committee Proposals-Member Proposals*, Committee on Local Government Proposal 1, VII:1605. Emphasis omitted.



posed, amended, and adopted distributes powers selectively among dominant political blocs so as to balance and preserve these interests in the foreseeable future. Only municipalities and counties are eligible for meaningful extended fiscal powers to deal with present and anticipated urban problems. The Local Government Committee itself acknowledged that the article proposed to give greater powers to *certain units* of local government through the home rule provisions of the new article.<sup>21</sup>

The new Illinois Constitution does provide new fiscal powers to home rule units. One must read the home rule section (article VII, section 6) together with other relevant articles of the constitution, however, to ascertain the specific breadth of these powers. The new constitution indeed does provide that *within constraints* home rule units do not have to go to the General Assembly for special or class legislation to authorize new taxes, other revenue sources, or fiscal administrative procedures. To appreciate the new fiscal opportunities, however, one must temper the general grant of powers to home rule units with a hard appraisal of accompanying constraints.

A casual reading of the general home rule grant might lead one to conclude that the new constitution indeed provides a broad mandate to municipalities (and potentially to counties) to generate revenues enabling them to perform the functions demanded of them. The general grant of power in section 6(a) does specify: "Except as limited by this Section, a home rule unit may exercise any power and perform any function pertaining to its government and affairs including, but not limited to, the power . . . to license; to tax; and to incur debt." The home rule section of the new constitution requires a three-fifths majority of the members elected to each house of the General Assembly to preempt or deny a home rule taxing function (section 6(g)). The constitution in section 6(h) emphasizes this point in the declaration of exclusivity: "The General Assembly may provide specifically by law for the exclusive exercise by the State of any power or function of a home rule unit other than a taxing power. . . ."

Although the constitution clearly establishes taxation as a crucial home rule power, it also sets down explicit, stringent limitations. Section 6(e) specifies that "a home rule unit shall have only the power that the General Assembly may provide by law . . . to license for revenue or impose taxes upon or measured by income or earnings or upon occupations." Let us first examine the constraints on licensing. Federal courts have ruled that the distinction between licensing to regulate and licensing for revenue is arbitrary, and the United States Supreme Court has ruled that the power to license encompasses both the power to regulate and the power to tax. Yet an amendment at the constitutional convention to delete the words "to license for revenue" from

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<sup>21</sup> Ibid., VII:1570-71.

section 6(e) of article VII, and thus give home rule units the general power to license for local objectives, was defeated in a hand vote. Thus a local licensing ordinance designed both to regulate and generate revenues to be applied to reach social ends in the regulated industry is suspect under the new constitution. The local power to license has traditionally accomplished these joint objectives in such enterprises as drayage and hauling, liquor distribution and retailing, and, more recently, outdoor advertising.

The constitutional restraint against imposing taxes upon or measured by earnings or upon occupations is severe, particularly when considered together with other fiscal restrictions in the document. Economists identify three general bases for imposing taxation: (1) taxes related to the ownership or transfer of wealth, (2) taxes related to income, and (3) taxes related to business and personal spending. The ownership of wealth has, for tax purposes, taken two forms, real property and personal property. With regard to classification of real property, counties with populations less than 200,000 are restricted by a uniformity of valuation section in the revenue article.<sup>22</sup> The eight counties in the 1970 Census with populations in excess of that amount are also restricted:

Subject to such limitations as the General Assembly may hereafter prescribe by law, counties with a population of more than 200,000 may classify or continue to classify real property for purposes of taxation. Any such classification shall be reasonable and assessments shall be uniform within each class. The level of assessment or rate of tax of the highest class in each county shall not exceed two and one-half times the level of assessment or rate of tax of the lowest class in that county. Real property used in farming in a county shall not be assessed at a higher level of assessment than single family residential real property in that county.<sup>23</sup>

Thus several recent innovations advocated by fiscal economists to alleviate urban blight or provide for more orderly land conversion — such as site value taxes, water right or air right taxes, farm use taxes — can be restricted in application and prohibited outright in various sections of the state.

Pragmatic taxes on ownership of wealth are further restricted by the revenue article section on personal property taxes that specifies, "On or before January 1, 1979, the General Assembly by law shall abolish all ad valorem personal property taxes. . . ."<sup>24</sup> Many businessmen, farmers, and householders have considered personal property taxes to be onerous and capricious levies. These taxes when classified by object such as autos, boats, and airplanes also have served as in-lieu user charges for municipalities and other units of local government. Now this specific form of taxation is prohibited.

The constitutional restraint against home rule units imposing taxes upon

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<sup>22</sup> Art. IX, sec. 4(a).

<sup>23</sup> Art. IX, sec. 4(b).

<sup>24</sup> Art. IX, sec. 5.

or measured by income or earnings precludes most familiar broad-based taxes related to income. The delegates to the constitutional convention clearly intended to deny home rule units the power to impose local business or personal net income taxes. The 1972 *Report and Recommendations* of the Chicago Home Rule Commission suggests that the convention delegates meant restrictions on home rule taxes to apply to *net* income or earnings taxes, thereby permitting *gross* income taxes or earnings taxes. Such business or personal taxes presumably would not permit exemptions or deductions from gross receipts. This argument is tenuous, as the Chicago Home Rule Commission itself observes: "Accountants and lawyers can doubtless advance arguments that 'gross receipts' are not 'income.' But whether this would convince the court that gross receipts are not income, the court itself will have to decide."<sup>25</sup>

If no taxes can be imposed on income or earnings, home rule units can still impose taxes on the entirety, or elements, of business *costs* without General Assembly approval. Thus a value-added tax has been suggested. A value-added tax has been defined as a levy on all the costs of production and distribution, except the cost of raw or semiraw materials used in the production of goods and services. As the Chicago Home Rule Commission has noted, however, historically value-added taxes have been employed by national governments rather than by states and municipalities because of severe economic dislocation and adverse allocation effects at the subnational level. Local firms would have to apportion total business on the basis of activities within and without the respective taxing jurisdiction. Such a tax also may add to retail sales prices in a pyramiding fashion, discouraging local purchases. The commission noted that there are those who also see nothing in a value-added tax that cannot be better attained through retail sales taxes.

A retail sales tax is one of the several possible levies in economists' third broad category of taxes, those related to business and personal spending. Under the 1970 constitution home rule units in Illinois may clearly impose retail sales taxes without further General Assembly authorization. Here a technicality may frustrate local officials. The state presently has a 4 percent Retailers' Occupation Tax, with statutory authority for municipalities to adopt a supplemental, or "piggy-back," tax rate of one percent. In the state courts this tax has been regarded as a levy on the privilege of engaging in the occupation of selling tangible personal property at retail. As "taxes upon or measured by . . . occupations" are expressly prohibited under section 6(e) of article VII, home rule units cannot simply adopt a higher incremental local tax rate. A permissible retail sales tax would have to be a consumers' transaction tax, based on a different legal theory. The question then arises whether

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<sup>25</sup> Chicago Home Rule Commission, *Report and Recommendations*, p. 436.

the courts would allow two identical taxes resting on different legal theories to be joined under single administration, specifically the present efficient "piggy-back" arrangements between the state and municipalities. The alternative is an elaborate, costly local tax administration system to collect an additional one-half percent or one percent sales tax.

The specific constraints in the constitution may cause other problems and necessitate various legal maneuvers for home rule units desiring to tax in order to meet local responsibilities. A home rule unit may adopt a payroll tax, but clearly the ordinance must be drawn so that in legal theory the levy cannot be interpreted as a tax upon or measured by income, earnings, or occupations. The ordinance must specify unambiguously that the tax is a levy upon the firm, measured by payrolls as one of its costs. Even then, the ordinance may be challenged as violating the intent of the constitutional convention delegates. Local Government Committee members commented that "occupations" were included in the restrictive section to preclude any opportunities for local income or payroll taxes.

If the few sections restricting the taxing powers of home rule units are so inclusive, what is left? Certainly several excise taxes and other transfer taxes are possible for home rule unit adoption without General Assembly approval. The Chicago cigarette tax adopted on December 10, 1971, is an illustration. The incidence of this tax is specified by ordinance as upon the consumer. The home rule unit's power to impose such a cigarette tax was upheld by the Illinois Supreme Court in the first case dealing with home rule revenue powers.<sup>26</sup> This five cents per package excise tax is expected to generate about \$20 million for the city of Chicago in its first twelve months of operation. This yield would represent about 5 percent of present receipts from all sources to the city's Corporate Purposes Fund.

The receipts from the cigarette tax may not be large in relation to the total city budget, but a supplemental increase in revenues of 5 percent to the city budget may be significant to offset portions of city program expansion. Practically speaking, this adopted tax may be the most productive of the specific excises. The Chicago Home Rule Commission weighed one proposal for a beer tax of ten cents per twenty-four bottle case, over and above the present state beer tax of seven cents per gallon. The case tax represents about 1.2 cents per gallon local tax, a current yield for Chicago of somewhat less than \$10 million, or less than 2 percent of the present city budget. Moreover, the Chicago Home Rule Commission noted, "If Illinois should act first [on a beer tax increase], the opportunities for a separate Chicago tax may be exhausted."<sup>27</sup>

<sup>26</sup> Bloom v. Korshak, 52 Ill. 2d 56, 284 N.E.2d 257 (1972).

<sup>27</sup> Chicago Home Rule Commission, *Report and Recommendations*, p. 409.

Home rule units indeed do have an opportunity to propose new, unique, and sometimes esoteric taxes under the general grant of constitutional powers. The Chicago Home Rule Commission report provides the most extensive list of taxes "probably" acceptable under the constitution. As mentioned, most of these possible taxes fall under the third economic basis for taxation — transactions related to business and personal spending. The list includes carbonated beverage taxes, gasoline taxes, parking taxes (adopted by the city of Chicago in December 1971; expected first year receipts are estimated at \$3.5 million), airline boarding taxes, commuter boarding taxes, stock transfer taxes, commodity transfer taxes, miscellaneous licenses, and user charges for special services such as police services at special events.

The revenue potential of these specific excises seems nominal when contrasted with the revenue generated by broad-based taxes. The general property taxes contribute a net \$180 million to Chicago's Corporate Purposes Fund; the one percent "piggy-back" on the state Retailers' Occupation Tax (retail sales tax) generates \$65 million; the Municipal Public Utilities Tax adds another \$32 million to the Corporate Purposes Fund. Most broad-based taxes either are prohibited or are impractical for home rule unit adoption. Finally, we must reiterate that only select classes of local governmental units are granted any home rule powers at all. These are municipalities over 25,000 population, smaller municipalities electing such status by referendum, and potentially the counties.

#### **FUTURE ALTERNATIVES FOR ILLINOIS LOCAL GOVERNMENT FINANCE**

In the face of political fragmentation of the tax base in most Illinois metropolitan areas and the misallocation of responsibilities for many urban public programs, home rule units would have difficulty resolving areawide problems even in the absence of constitutional constraints on adopting popular broad-based taxes. Delegates to the Illinois constitutional convention acknowledged that home rule status and general powers would not be an instant panacea for metropolitan ills. Other organizations such as the Advisory Commission on Intergovernmental Relations also have become more pragmatic in their recommendations over the last half-dozen years. The ACIR now has reservations over the realities of comprehensive areawide governments ("metropolitan government") and the probabilities of consolidation among general purpose and special purpose units of local government.<sup>28</sup> Among those likely to oppose such changes are the people who now benefit from the differences in tax levels. Social disparities and established interests in maintaining local government fiefdoms frustrate movements toward consolidation.

<sup>28</sup> ACIR, *Urban America and the Federal System*, pp. 81–82.

One possible way to alleviate fiscal overburdens and disparities in local government finance would be to realign responsibilities for public education and welfare. The principal local government expenditure statewide is in the area of education. The new Illinois Constitution specifies, "The State has the primary responsibility for financing the system of public education."<sup>29</sup> Recent court decisions in other states also have drawn attention to whether Illinois is equalizing fiscal resources among its 1,090 school districts. The state presently is paying 41.2 percent of all state and local governmental expenditures on public schools for fiscal 1972-73, up from 29.6 percent five years ago. If "primary responsibility" is narrowly interpreted as over one-half of total spending and Illinois were to increase the state portion to, for example, 55 percent, this would represent a shift in tax sources of \$390 million from the local property tax to state sources, possibly the state income and sales taxes.

A second area of large governmental expenditure is public welfare. Public assistance costs have risen rapidly since 1965. In studying the financing of adequate public welfare the ACIR concluded "that maintaining a properly functioning and responsive public assistance program as presently operating is wholly beyond the severely strained fiscal capacity of state and local government to support. The Commission therefore recommends that the Federal Government assume full financial responsibility for the provision of public assistance."<sup>30</sup> The federal government indeed has increased fiscal support of public welfare programs in the ensuing seven years, though the formulas for financing several major public assistance programs continue to call for equally shared federal and state fiscal responsibility. Direct local government contributions are currently estimated at less than 3.5 percent of total spending in Illinois on public assistance. Complete federal assumption of fiscal responsibility for public welfare therefore would provide immediate relief to the state, rather than to local governments. The realignment of fiscal responsibilities ultimately benefits local governments, however, in a stepwise fashion in that the pressure is reduced on the major state taxes that are shared with municipalities. If a greater portion of federal and state monies is assigned through realignment of fiscal responsibilities to resolve local problems, then the amounts of additional revenues that can be generated by home rule units under the new taxing powers will become relatively more important as supplementary sources of finance.

The recent developments in state and federal revenue sharing to general purpose local government units set a significant precedent for changing relationships in fiscal federalism. In particular the federal allocation formula provides some incentive for general purpose governments to provide services

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<sup>29</sup> Art. X, sec. 1.

<sup>30</sup> ACIR, *State Aid to Local Governments* (Washington, D.C.: April 1969), p. 16.



to select component areas rather than to create additional special districts. The effect of these voluntary fiscal incentives and indeed the entire revenue-sharing program rests upon the magnitudes and assured maintenance of these new intergovernmental fiscal transfers. Both the federal and the Illinois revenue-sharing programs are modest, and present incentives through revenue sharing to consolidate local government responsibilities are correspondingly weak. Moreover, both revenue-sharing programs are vulnerable to possible legislative action reducing local government shares. Proponents of increased Illinois state funding of public school expenditures, for example, have proposed that some portion of incremental state monies be realized through a total dollar ceiling on present Illinois state income tax shares to general purpose local governments. This recommendation, if adopted at the present state disbursement level, would gradually reduce the state revenue sharing from the legislated 8.3 percent of income tax receipts to lesser and lesser percentages as overall income tax receipts respond to economic growth. The federal program also is tenuous; the Fiscal Assistance Act has a legislated life of only five years. The present confusion over the future of federal categorical aid programs mentioned previously is an excellent illustration of the precarious position of local governments which rely on intergovernmental fiscal transfers.

Even with federal and state assumption of increased fiscal responsibilities for education and public assistance, plus increased revenue sharing, the metropolitan problem of numerous fragmented units of local government trying to resolve complex, areawide social needs would remain. One possible resolution rests with the increased potential of county government. The local government article gives counties increased power and flexibility in assuming responsibilities. A county qualifies for home rule status if its government has a chief executive officer elected by its residents. Home rule counties would realize the same new taxing powers as do home rule municipalities. Some potential taxes which may not seem viable at the municipal level because of close municipal competition or opportunities for tax avoidance may be instituted at a countywide level. Although the constitution specifies that a municipal ordinance shall prevail within its jurisdiction if there is conflict between the municipal ordinance and a home rule county ordinance, the Illinois Supreme Court recently ruled the following:

In the case before this court there is no conflict or inconsistency within the meaning of section 6(c) which requires us to hold that the Plaintiff's [city of Evanston] tax ordinances must prevail to the exclusion of the defendant's [county of Cook] tax ordinance within the corporate limits of these municipalities. This is simply a situation in which two separate and distinct units of local government are exercising the power which they possess by virtue of section 6(a) of Article VII of the 1970

constitution to tax the same transaction. (All units of local government in this case are home rule units.)<sup>31</sup>

Home rule counties, like home rule municipalities, may impose additional taxes upon areas within their boundaries for the provision of special services to those areas and may provide for such debt incurred.<sup>32</sup> Thus one reason for creating special purpose governments within a home rule county is eliminated. Cook County is the only home rule county at present. Whether residents of other urban counties will vote for governmental reorganization resulting in home rule status and whether such home rule counties would assume additional governmental powers and responsibilities are at this time matters of conjecture.

We are at a crucial time in the redefinition of local government responsibilities under our federal system of government. The new revenue sharing programs set a precedent in applying receipts from broad-based taxes to local government programs conceived and administered at the local level. In the sense that a dollar is a dollar from whatever source, intergovernmental fiscal transfers can be viewed as a positive step to mitigate the financial plight of Chicago and other cities. But revenue sharing is not a substitute for truly broad home rule taxing powers. If local governments continue to hold responsibility to alleviate social concerns within their jurisdictions, then these governments also ought to have the option of choosing from a wide spectrum of tax sources the most appropriate tax to generate needed revenues. The constitutional restrictions on home rule taxing powers and other local governmental taxing powers may so hamstring Chicago and other central cities that local government officials again may have to undertake the familiar pilgrimages to the state legislature for fiscal relief.

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<sup>31</sup> *City of Evanston v. County of Cook*, 53 Ill. 2d 312, 291 N.E.2d 823 (1972).

<sup>32</sup> Art. VII, sec. 6(1).



## HOME RULE AND LOCAL GOVERNMENT FINANCE: A LAWYER'S PERSPECTIVE

J. NELSON YOUNG

In his paper on "Home Rule and Local Government Finance: An Economist's Perspective" (pp. 73-88), Professor Schoeplein emphasizes the critical need for additional financial resources to enable local governmental units in Illinois to provide essential services. Statistical data cited by Professor Schoeplein demonstrate not only that the needs for these services are increasing in staggering proportions, but also that they are unevenly distributed among the local governmental bodies.

Excluding the possibility of shifting direct responsibility for certain governmental services to the state or federal government, there are three possible ways of alleviating the critical fiscal needs of local government: federal revenue sharing, state revenue sharing, and the utilization of additional local revenue measures. It is the objective of this paper to evaluate the revenue powers of the state and local governmental bodies in the light of the Illinois Constitution of 1970 and recent judicial developments thereunder. This evaluation requires consideration of the revenue article of the new constitution and its impact upon home rule units and other local governmental bodies.

### TAXING POWER IN GENERAL

For a period of thirty-seven years from 1932 when *Bachrach v. Nelson*<sup>1</sup> was decided until 1969 when *Bachrach* was overruled by *Thorpe v. Mahin*,<sup>2</sup> state and local governmental bodies in Illinois were limited in their exercise of the taxing power "to (1) property taxes on a valuation basis; (2) occupation taxes; and (3) franchise or privilege taxes."<sup>3</sup> By adopting a narrow and erroneous rule of construction,<sup>4</sup> and by classifying an income tax as a property

<sup>1</sup> 349 Ill. 579, 182 N.E. 909 (1932).

<sup>2</sup> 43 Ill. 2d 36, 250 N.E.2d 633 (1969).

<sup>3</sup> 349 Ill. at 588-89, 182 N.E. at 913.

<sup>4</sup> In *Bachrach*, the court took the position that the state held only those powers to tax which were specifically enumerated in the constitution. The long-prevailing rule of construction is that the state has all powers not specifically prohibited by the constitution. In a contemporaneous decision (*Miles v. Dep't of Treasury*, 209 Ind. 172, 199 N.E. 372 (1935)) the Indiana Supreme Court described the prevailing rule in

tax, the *Bachrach* decision not only deprived the state of a major source of revenue, but also unduly delayed any significant reform in the state tax structure.

The decision in *Thorpe v. Mahin* sustaining a general income tax came at a propitious time—a few months prior to the convening of the Sixth Illinois Constitutional Convention. In removing the straitjacket imposed by *Bachrach*, the *Thorpe* decision provided a change in constitutional philosophy and a datum point for the new revenue article. The convention adopted this philosophy by providing in the revenue article of the 1970 constitution that “the General Assembly has the exclusive power to raise revenue by law except as limited or otherwise provided in this Constitution.”<sup>5</sup> As indicated by the report of the Committee on Revenue and Finance, this language was intended to avoid the problem of narrow construction which had arisen under the former constitutional provisions.<sup>6</sup> Although the new revenue article does impose certain restrictions upon the exercise of the taxing power, it is clear that except for these specific limitations the taxing power of the state is a plenary power. In a real but general sense, broadening of the state power to tax redounds to the benefit of the local governmental bodies of the state.

#### STATE INCOME TAX

At this juncture, the importance of the state income tax to the state's fiscal structure is paramount—not only in its productivity, but also in its flexibility and potential. In the fiscal year 1971, the first full fiscal year of its application, the income tax produced \$1.012 billion, or 33.8 percent of total state tax collections, compared with \$.993 billion, or 33.2 percent from sales and use taxes, the second ranking group of taxes in total collections. In the fiscal year 1972, income tax collections totaled \$1.136 billion, or 34.5 percent of total state tax collections, as compared to \$1.1 billion, or 33.4 percent from sales and use taxes.<sup>7</sup>

Although article IX, section 3(a), of the constitution of 1970 prohibits a graduated income tax and limits the differential in rates as between corporations and individuals to a maximum ratio of 8 to 5, the income tax pos-

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the following terms: “The power to tax is inherent in, and essential to, the existence of the state, and may be exercised without limit upon property, occupations, and activities carried on within the state unless prohibited by state or Federal Constitutions. . .

“The right to tax is not a constitutional grant, but exists independently, and constitutional provisions regarding taxation operate as limitations only on an otherwise unlimited power.” (209 Ind. at 176–77, 199 N.E. at 374).

<sup>5</sup> Art. IX, sec. 1.

<sup>6</sup> Illinois, Sixth Constitutional Convention, *Record of Proceedings, Committee Proposals—Member Proposals*, Committee on Revenue and Finance Proposal 2 (Springfield, 1972), VII:2066.

<sup>7</sup> Illinois, Department of Revenue, *Twenty-eighth–twenty-ninth Annual Report* (1972), table 1, p. 21.

sesses the greatest potential for additional fiscal resources. Merely doubling the existing rates by imposing a 5 percent tax upon individuals and an 8 percent tax upon corporations would provide additional revenues of approximately \$1.136 billion using fiscal 1972 collections as the measure. Compared with the highly regressive sales and use taxes, the rates of the state income tax are relatively low. Furthermore, the burden of increased state income taxes would be offset in part by the deduction allowed to taxpayers under the federal income tax. An increase in the state income tax would divert to the state treasury amounts which would otherwise be paid to the federal government. In the case of a corporation with taxable income in excess of \$25,000, the net effective rate of an 8 percent state income tax would be approximately 4.16 percent. With respect to individuals, the higher their federal income tax bracket, the less the burden of the Illinois income tax. Thus, the burden of a 5 percent state income tax upon individuals in the top 70 percent federal tax bracket would be 1.5 percent. Individuals in the lower income tax bracket would, of course, bear a greater proportionate burden. For example, an individual in the 30 percent federal bracket would bear a burden of 3.5 percent under a 5 percent state income tax.<sup>8</sup>

With the advent of the income tax, there has been a dramatic increase in state aid for the public school system<sup>9</sup> and an initiation of state aid to municipalities and counties.<sup>10</sup> State aid to municipalities and counties was designed to alleviate the loss of revenue due to the abolition of the personal property tax upon individuals. In view of the needs of local government, there are compelling reasons to expand state aid to local governmental bodies over and above the amounts required to replace revenues lost or to be lost by abolition of personal property taxes. It is submitted that the state income tax is the ideal source of the additional funds to achieve this objective.

#### **ABOLITION OF THE PERSONAL PROPERTY TAX**

By its recent decision in *Lehnhausen v. Lake Shore Auto Parts Co.*,<sup>11</sup> the United States Supreme Court has sustained the validity of the constitutional amendment which abolished the personal property tax *as to individuals*. Abolition of the personal property tax upon individuals was initiated by an

<sup>8</sup> In view of the actual burden of the Illinois income tax, one may well question the propriety of the constitutional prohibition upon graduated rates.

<sup>9</sup> State aid to the public schools increased from \$516.6 million in the school year 1969 to \$1,028.7 million in the school year 1972 (*A New Design: Financing for Effective Education in Illinois*, Final Report of the Finance Task Force, Governor's Commission on Schools (1972)), table 4, p. 31.

<sup>10</sup> Ill. Rev. Stat., ch. 120, sec. 9-901(b) (1971). Under this provision one-twelfth of the net revenue from the income tax is placed in the "Local Governmental Distributive Fund" for allocation to municipalities and counties.

<sup>11</sup> 410 U.S. 356 (1973), *rev'g* 48 Ill. 2d 323, 269 N.E.2d 465 (1971).

amendment of the constitution of 1870 and was approved by the voters in November 1970, a few weeks prior to the adoption of the constitution of 1970. This action with respect to the old constitution was effectively incorporated in the new constitution. Article IX, section 5(b), provides that "any ad valorem personal property tax abolished on or before the effective date of this Constitution shall not be reinstated."

There are no data available as to the amount of revenue derived from the personal property tax upon individuals. Assuming, however, as a rough estimate that the amount of this revenue has been 50 percent of all personal property taxes, the present or potential loss from the abolition of such tax would be approximately \$250 million.<sup>12</sup> It should be noted, however, that there may be no actual loss of revenue by a local governmental unit to the extent that the property tax levy can be applied to property which remains upon the tax rolls. In that case, the burden of the taxes upon individual personal property is merely shifted to real property and corporate personal property. It should also be noted that a part of the loss may be effectively recouped by municipalities and counties through allocations from the Local Governmental Distributive Fund.<sup>13</sup>

With respect to personal property, both tangible and intangible, only that owned by corporations remains a part of the Illinois property tax base.<sup>14</sup> Furthermore, section 5(c) of article IX requires that the General Assembly abolish the personal property tax upon corporations on or before January 1, 1979. Concurrently with the abolition of the personal property tax upon corporations, the General Assembly is required to replace all revenue lost by units of local government and school districts as a consequence of such abolition. Replacement of these lost revenues must be funded by statewide taxes *solely upon* corporations.<sup>15</sup> To facilitate such replacement section 5(c)

<sup>12</sup> In round figures, total personal property tax extensions in Illinois for the year 1969 were \$514 million; for the year 1970, they were \$477 million (Illinois, Department of Local Government Affairs, Office of Financial Affairs, *Illinois Property Tax Statistics 1969*, table IV, p. 6; *ibid.*, 1970, table IV, p. 7).

<sup>13</sup> See note 10 above and related text.

<sup>14</sup> This statement is an overgeneralization and must be qualified in view of developments subsequent to the preparation of this paper. Upon remand of *Lake Shore Auto Parts Co.*, the Illinois Supreme Court held that personal property of partnerships, professional associations, trustees, and other fiduciaries remains subject to taxation. The court concluded that the exemption *as to individuals* applies only with respect to direct beneficial ownership by natural persons. 54 Ill. 2d 237, 296 N.E.2d 342 (1973).

<sup>15</sup> Section 5(c) requires the General Assembly to replace all revenue lost by units of local government and school districts by imposing statewide taxes *solely upon* "those classes relieved of the burden of paying ad valorem personal property taxes because of the abolition of such taxes subsequent to January 2, 1971." Emphasis added. In view of the supplemental decision on remand in *Lake Shore Auto Parts Co.* (see note 14 above), it would also be necessary to obtain replacement revenues from partnerships, professional associations, trusts, and other fiduciaries.

lifts the restrictions upon income taxes imposed by section 3(a) which otherwise limit the state to one income tax and to a rate differential as between corporations and individuals not to exceed the ratio of 8 to 5. In view of these provisions it is obvious that delegates to the constitutional convention had in mind the use of the state income tax as a replacement for the personal property tax.

If it is accurate to conclude that personal property tax revenues have been derived one-half from individuals and one-half from corporations, it would be necessary on the basis of the most recent data to impose a statewide tax upon corporations which would produce approximately \$250 million annually.<sup>16</sup> And if the General Assembly were to determine as a matter of policy that all personal property taxes should be replaced by the state, the annual allocation to local governmental bodies for this purpose would total \$500 million.

#### **POSSIBLE REDEFINITION OF PERSONAL PROPERTY AS REAL PROPERTY**

Although the personal property tax is to be completely abolished on or before January 1, 1979, a nice question arises as to the existing statutory designations of property as either real or personal for property tax purposes. This issue is of special significance in relation to the future abolition of the personal property tax upon corporations. Specifically, the question is whether there are certain items of property which are currently defined as personal property under the Illinois property tax provisions which more appropriately should be defined as real property.

First it should be noted that there is no specific limitation in the new constitution upon legislative authority to define real property and personal property for purposes of the general property tax. Under universal property tax systems it is well established that the legislature has broad power to define what shall be assessed as real property and what shall be assessed as personal property.<sup>17</sup> This rule has long been recognized in Illinois.<sup>18</sup> Section 1 of the new article IX states that "the General Assembly has the exclusive power to

<sup>16</sup> See note 12 above.

<sup>17</sup> E.g., *Portland Terminal Co. v. Hinds*, 141 Me. 68, 77, 39 A.2d 5, 9 (1944): "It is within legislative authority, for the purposes of taxation to provide that real estate shall be assessed as personalty or that personalty shall be taxed as realty."

<sup>18</sup> See *Johnson v. Roberts*, 102 Ill. 655, 659-60 (1882), wherein the court stated: "It is conceded that the legislature is invested with and may exercise all governmental power, unless restricted by the State constitution, or the power has been delegated to the general government, or the Federal constitution has prohibited its exercise. No reason is perceived why the General Assembly, if so disposed, may not declare every species of property personal, and subject it to all the incidents of personalty; or why it may not, for the purposes of taxation, require any portion of real estate, or any of its parts or accessories, to be listed, taxed, and sold for the payment of taxes thereon, as personal property. . . ." This decision was followed in *Shelbyville Water Co. v. People*, 140 Ill. 545, 30 N.E. 678 (1892).

raise revenue by law *except as limited or otherwise provided* in this Constitution.”<sup>19</sup> Sections 4 and 5, relating to property taxes, specify no limitations or restrictions with respect to the power of the General Assembly to define real and personal property. One might speculate therefore as to whether the General Assembly could redefine real property to include certain items previously assessed as personal property. For example, would it be within the legislative power to define real property to include mobile homes which are used as permanent residential property, or to include pipelines and utility distribution systems? This issue would turn on whether it is reasonable to categorize such items as real property.

No apparent basis exists for applying the rule of contemporaneous construction to bar such legislative action. In view of the long-existing legislative authority to define real and personal property, one might reasonably have anticipated extensive discussions of this question in the Committee on Revenue and Finance and on the floor of the convention. The formal record is sparse, but the author has been informed that there was considerable discussion of this issue in the committee. In any case, the committee concluded that the definition of real and personal property should be left to legislative determination.<sup>20</sup> Furthermore, since the convention adopted article IX with the clear intention that the General Assembly shall have plenary power to tax except as otherwise specifically provided therein, there is good reason to conclude that the General Assembly holds the power to redefine real and personal property in a reasonable manner.<sup>21</sup>

<sup>19</sup> Emphasis added.

<sup>20</sup> This conclusion is reflected in the report of the committee in the following statement upon its proposed section 4.2, which evolved into section 5 of article IX relating to personal property taxes: “No distinction between real and personal property is made in this section” (Ill., Sixth Const. Conv., *Record of Proceedings*, Revenue and Finance Committee Proposal 2, VII:2129).

There is also a revealing statement in the convention proceedings which is helpful on the point that authority is vested in the legislature to define certain property as real property. During the August 10, 1970, session, delegate Louis F. Bottino directed to delegate John M. Karns, Jr., chairman of the Revenue and Finance Committee, a question as to whether mobile homes were to be treated as personal property or as real property. Delegate Karns responded by noting the alternative methods of taxing mobile homes and concluded with the observation that this property could be taxed as real property if the legislature were to define mobile homes as such (Ill., Sixth Const. Conv., *Record of Proceedings, Verbatim Transcripts*, V:3918).

<sup>21</sup> New York provides an excellent example of a comprehensive definition of real property. The New York constitution prohibits ad valorem taxation of intangible personal property (New York Constitution, art. XVI, sec. 3). Moreover, as a matter of policy, the legislature has determined that tangible personal property shall also be exempt from ad valorem property taxes (N.Y. Real Prop. Tax Law, sec. 300 (McKinney 1960)). But the exemption of tangible and intangible personal property is complemented by a comprehensive definition of real property which includes utility distribution systems and mobile homes (N.Y. Real Prop. Tax Law, sec. 102(12)(d) and (g) (McKinney 1960)). Inclusion of each of these items within the definition of



To the extent that property previously assessed as personal property were shifted into the category of real property, there would be no loss of revenue at the local level upon the abolition of the personal property tax. To achieve equitable treatment of similar properties, to alleviate the erosion of the property tax base, and to reduce the burden placed upon the state to replace revenues lost by abolition of the personal property tax, the General Assembly should give serious consideration to the enactment of a realistic and comprehensive definition of real property.

#### CLASSIFICATION OF REAL PROPERTY

By authorizing classification of personal property and by providing for the eventual abolition of all personal property taxes, the new constitution abandoned the rule of universal uniformity imposed under the constitution of 1870. As to real estate, however, section 4(a) of article IX provides that "taxes upon real property shall be levied uniformly by valuation ascertained as the General Assembly shall provide by law." It should be noted that this requirement is binding only with respect to the smaller counties with populations under 200,000. Counties with populations in excess of 200,000<sup>22</sup> are permitted by section 4(b) to classify or to continue to classify real property subject only to such limitations as might be prescribed by the General Assembly. In addition, section 4(b) imposes three conditions with respect to such classification: (1) the classification must be reasonable and the assessments uniform within each class; (2) the assessment ratio or rate of tax as between the highest and the lowest classification shall not exceed two and one-half to one; and (3) land used in farming shall not be assessed at a higher level than single-family residential property.

These provisions, which permit classification of real property in the larger counties but not in the smaller counties, create a problem with respect to taxing districts which overlap counties. If a taxing district lies partly in a county which classifies real property and partly in a county which does not, there is a problem as to fair allocation of tax burden between the respective portions of the taxing district. A similar problem arises if an overlapping taxing district embraces counties which classify real property in a different manner. Section 7 of article IX authorizes the General Assembly to provide

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real property has been sustained as a valid classification (*People ex rel. Holmes Elec. Protective Co. v. Chambers*, 1 N.Y.2d 760, 135 N.E.2d 56, 152 N.Y.S.2d 304 (1956), *aff'g* 285 App. Div. 886, 139 N.Y.S.2d 245 (1955); *New York Mobile Homes Ass'n v. Steckel*, 9 N.Y.2d 533, 175 N.E.2d 151, 215 N.Y.S.2d 487, *motion to amend remittitur granted*, 10 N.Y.2d 814, 178 N.E.2d 231, 221 N.Y.S.2d 515 (1961), *appeal dismissed*, 369 U.S. 150 (1962)).

<sup>22</sup> According to the 1970 U.S. Census, eight Illinois counties have populations in excess of 200,000: Cook, DuPage, Kane, Lake, Madison, St. Clair, Will, and Winnebago.



by law for fair apportionment of the tax burden in these circumstances. The best solution for this problem would be an initial allocation of the total tax levy between the respective portions of the taxing district on the basis of the full equalized value of property located in each county.<sup>23</sup> Subsequent allocations to the taxpayers in the taxing district within each county would then be made in accordance with the scheme of classification applicable in each county. In this manner the total tax burden would be fairly apportioned and each county would retain control of its scheme of classification.

Classification of real property may not be a critical issue for home rule units. It does have a bearing, however, upon the fairness of allocation of state aid if one were to consider local "property tax effort." To illustrate this point, assume that there are two governmental units of the same type with the same equalized property tax base. One is located in a county which classifies real property with the result that the aggregate actual assessment of real property is 80 percent of equalized value. The other is located in a small county which cannot classify and the actual assessment of real property is 100 percent of equalized value. If the tax levy by each unit were in the same amount, the "tax effort" of the unit located in the larger county would only be four-fifths that of the unit located in the smaller county. Consequently, "tax effort" should be measured with reference to the effective tax rates computed upon full equalized value. A comparison of effective tax rates may be a significant factor in evaluating the allocation of state aid.

#### REVENUE MEASURES AVAILABLE TO HOME RULE UNITS

By article VII, section 6(a), of the 1970 constitution, home rule units are granted what appears at first blush to be an autonomous power to tax. This grant is circumscribed, however, by section 6(e), which specifies that a home rule unit shall have only the power that the General Assembly may provide by law "to license for revenue" or to "impose taxes upon or measured by income or earnings" or to impose taxes "upon occupations." In the absence of specific legislative authority it is clear that the restrictive language of section 6(e) bars the imposition of local income, earnings, and occupation taxes. Thus, what appears at first to be a complete departure from the traditional requirement that revenue powers be specifically delegated by the legislature to local governmental bodies proves to be only a limited departure.

Nevertheless, article VII does confer significant autonomous taxing authority upon home rule units, at least with respect to consumer taxes and other excise taxes not within the proscribed classes. This was the intention

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<sup>23</sup> A bill to deal with this problem in the manner described in the text was considered at the last session of the General Assembly (S.B. 1472, Seventy-seventh General Assembly). A similar bill was passed in the current legislative session (S.B. 357, Seventy-eighth General Assembly) but was vetoed by the governor.

of the convention as indicated by the report of the Committee on Local Government,<sup>24</sup> and this intention has been recognized in the recent decisions sustaining the Chicago cigarette<sup>25</sup> and parking<sup>26</sup> taxes. In both these cases, the Illinois Supreme Court emphasized the point that although the duty to collect and remit the taxes was placed upon the vendor of the goods or services the legal incidence of the tax was directly imposed upon the consumer.

In appraising the taxing powers granted to home rule units under the constitution of 1970, the chief question is whether the door has been opened to the imposition of commonly recognized broad-based taxes such as taxes upon sales, use, net income, gross income, business activities, payrolls, and earnings. At the risk of overgeneralization, it appears that any excise or privilege tax which is *imposed upon the consumer or user* of goods or services is within the scope of the home rule power to tax.

Although general "consumer" sales or use taxes may be available under the home rule taxing power, practical and political considerations discourage utilization of such taxes in the face of the existing state and local occupation-use tax structure. Among the broad-based taxes, perhaps the payroll tax has generated the most interest and discussion. But this tax, if it were to be utilized, could not be imposed upon wage earners without violating the prohibition upon taxes measured by income or earnings.<sup>27</sup> It has been suggested that a payroll tax imposed directly upon the employer might fall within the permissible range.<sup>28</sup> But a circumspect examination of this proposal leads one to conclude that there is considerable doubt that such a tax would be sustained. The report of the Local Government Committee is emphatic in making the point that the provision which comprises section 6(e) of article VII was intended to prohibit a payroll tax as a tax on earnings.<sup>29</sup> Although the courts are admonished by section 6(m) of article VII to construe the powers of home rule units "liberally," it is likely that considerable weight

<sup>24</sup> Ill., Sixth Const. Conv., *Record of Proceedings*, Local Government Committee Proposal 1, VII:1655-56. Article VII, section 6(a), also lifts the statutory property tax limitations upon home rule units (*ibid.*, VII:1656-67 (example 20)). Any realistic appraisal, however, leads to the conclusion that, in view of the general public concern with respect to property tax burdens, this freedom to impose additional property taxes without limitation does not enhance the revenue powers of home rule units. For clarity with respect to the extent of such power, it also should be noted that article VII, section 6(g), reserves to the General Assembly authority to limit this power by three-fifths vote of the members of each house.

<sup>25</sup> *Bloom v. Korshak*, 52 Ill. 2d 56, 284 N.E.2d 257 (1972).

<sup>26</sup> *Jacobs v. City of Chicago*, 53 Ill. 2d 421, 292 N.E.2d 401 (1973).

<sup>27</sup> Chicago Home Rule Commission, *Report and Recommendations* (Chicago: University of Illinois at Chicago Circle, 1972), pp. 450-52.

<sup>28</sup> *Ibid.*; and David C. Baum, "A Tentative Survey of Illinois Home Rule (Part I): Powers and Limitations," *University of Illinois Law Forum* (1972), p. 145.

<sup>29</sup> Ill., Sixth Const. Conv., *Record of Proceedings*, Local Government Committee Proposal 1, VII:1671-73.

would be placed upon the committee report in evaluating a tax designed to circumvent a specific constitutional proscription.

Assuming, however, that a payroll tax could be framed in a manner which would avoid the prohibition with respect to a tax upon income or earnings, the proscription with respect to occupation taxes remains a major hurdle. The decision in *Steward Machine Company v. Davis*,<sup>30</sup> which sustained the unemployment tax under the Social Security Act as a valid federal excise tax, sheds some light on this matter. In that case, the tax was laid "as an excise upon the relation of employment." In contesting the tax, the taxpayer-employer contended that the relation of employment is so essential to the pursuit of happiness that it was beyond the power of Congress to tax. In answer, the Court stated in part as follows:

Employment is a business relation, if not itself a business. It is a relation without which business could seldom be carried on effectively. The power to tax the activities and relations that constitute a calling considered as a unit is the power to tax any of them. The whole includes the parts.<sup>31</sup>

In this statement, the Court was making the point that since there is no constitutional problem with respect to the imposition of a federal excise tax upon the privilege of engaging in a business, *a fortiori* there is no question as to the validity of a tax imposed upon one of the essential elements of a business, namely, employment. It is submitted that inasmuch as employment is an integral and essential part of the conduct of a business, a payroll tax imposed directly upon the employer could reasonably be considered in substance a tax upon the privilege of engaging in a business. If this were the case, a payroll tax would fall within the proscription upon occupation taxes. It would appear that a similar objection could be made with respect to a value-added tax. Likewise, a general business tax irrespective of the measure of the tax would probably be deemed an unauthorized general occupation tax. Finally, a tax upon or measured by gross receipts would be vulnerable in view of the prohibition upon an earnings tax.

## SUMMARY

With the exception of the specific prohibition upon a graduated income tax, the constitution of 1970 has enlarged the general revenue powers of the state and of local governments and has extended to home rule units certain autonomy with respect to the taxing power which did not previously exist. At this juncture a realistic appraisal of the effect of these changes leads to two observations. With the authority to impose excise taxes upon the consumption of goods and services, home rule units are in a position to utilize

<sup>30</sup> 301 U.S. 548 (1937).

<sup>31</sup> 301 U.S. at 581.

selected consumer taxes which can be helpful in alleviating fiscal needs. However, it appears that any major and substantial fiscal relief must come from state revenue sharing, for which the state income tax is the obvious and most likely source. Such revenue is needed over and above that required to replace the revenues which have been or will be lost by abolition of the personal property tax.

There are three matters relating to the property tax which warrant concern. One is the need for a more realistic statutory definition of real property to protect the property tax base as we proceed with the abolition of the personal property tax. This would also reduce the demands upon the state fiscal system for replacement of revenue lost by local government. Another matter involves legislation to effect a fair allocation of the property tax burden among the taxpayers residing within taxing districts which overlap different counties where the counties adhere to different classification schemes in the assessment of real property. Finally, consideration should be given to local "tax effort" and financial need in determining the amount of state revenue sharing.



## IMPROVED LAND USE REGULATION FOR THE HOME RULE MUNICIPALITY

CLYDE W. FORREST

"The king is dead — Long live the king"

This ancient declaration of allegiance to continuity of rule is analogous to the current legal situation in Illinois with respect to Dillon's Rule. The old Dillon's Rule is dead, but the new rule is alive and well. Indeed, a case can be made that it can now be applied to reverse the severe legislative and judicial limitations on land use regulation by home rule municipalities. Applicable provisions of the rule are as follows:

A municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation . . . not simply convenient, but indispensable. Any fair, reasonable, substantial doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied.<sup>1</sup>

Dillon's discussion of the topic makes it clear that legislative intent is to be determined. If the legislature clearly intended to confer a power, the courts should hold it to exist; otherwise, they should not.

This rule of strict construction applied to the requirement of the new Illinois Constitution that "powers and functions of home rule units shall be construed liberally"<sup>2</sup> should result in judicial support for a broad interpretation of home rule authority. While home rule will not provide authority to deal with all the shortcomings of existing land use law, it can have major impact on the following undesirable conditions:

1. Existing scope of authority of land use law is limited to short range, economic, nonconservation-oriented interests.
2. Diverse land use regulations in such areas as zoning and subdivision are inadequately coordinated and result in complicated and obscure procedures.
3. Citizen participation is not facilitated and when it takes place is often unnecessarily obstructive.

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<sup>1</sup> John F. Dillon, *A Treatise on the Law of Municipal Corporations*, 5th ed. (Boston: Little, Brown, 1911), vol. 1, sec. 237. Emphasis omitted.

<sup>2</sup> Art. VII, sec. 6(m).

4. Zoning ordinance procedures are often internally inconsistent, complex, and fraught with opportunity for poor administration.

This paper is intended to outline legal arguments to support innovative solutions to these problems, and to offer suggestions for consideration by home rule units to improve the administration of land use controls.

#### **POLICE POWER AND CONSTITUTIONAL HOME RULE**

The police power is exercised under many titles: subdivision regulation, pollution control, historic preservation, and, of course, the familiar term zoning. The basic position of this writer is that permissive enabling acts are no longer binding on home rule units in Illinois.

Authority is now granted to home rule units by the Illinois Constitution of 1970, article VII, section 6(a) :

Except as limited by this Section, a home rule unit may exercise any power and perform any function pertaining to its government and affairs including, but not limited to, the power to regulate for the protection of the public health, safety, morals and welfare; to license; to tax; and to incur debt.

#### **PRE-HOME RULE STATUS**

The conventional wisdom concerning the zoning authority of a local governing body presents a serious problem. The general rule is that "as zoning regulations were unknown at common law, the intent to vest such power cannot be presumed from a grant of police power in general terms."<sup>3</sup>

As late as 1971, Illinois courts were stating that cities have no inherent zoning power.<sup>4</sup> Land use regulations are within the police power and, therefore, are subject to state control. State control may, however, be exercised through constitutional authority, legislative enactment, or judicial interpretation.

The question of whether a zoning enabling act takes precedence over a general grant of constitutional police power authority to home rule units has yet to be answered judicially. It would seem that when the legislative act is merely permissive or enabling and not mandatory in nature, there should be no difficulty in recognizing the primacy of a constitutional grant of authority to home rule units.

An early Ohio case illustrated the advantages of home rule in zoning by holding that where a general enabling act and a specific constitutional grant of police power to home rule units exist, "*the municipality is doubly empowered to enact [the zoning ordinance].*"<sup>5</sup>

<sup>3</sup> Robert M. Anderson, *American Law of Zoning* (Rochester, N.Y.: Lawyer's Co-op Publishing, 1968), sec. 3.10.

<sup>4</sup> *Beam v. Erven*, 133 Ill. App. 2d 193, 272 N.E.2d 685 (1st Dist., 1971).

<sup>5</sup> *Pritz v. Messer*, 112 Ohio 628, 149 N.E. 30 (1925).



In discussing the distinction between what is regarded as a matter of local government and what is subject to control by the state, McQuillin makes the following remarks concerning zoning:

Zoning has been said to be a matter of strictly municipal or local concern. However, the municipal power to zone ordinarily rests upon statute and is within the legislative control as a state affair *within the limits of the state constitution*.<sup>6</sup>

Since the constitutional grant of police power to home rule units in Illinois was intended to limit the General Assembly's authority over home rule units and to bestow power of local self-government except as limited by the constitution, the home rule grant of police power should be construed to include land use controls.

### CONSTITUTIONAL INTENT

The extent of the authority granted by article VII, section 6, should be determined by the intent of the delegates to the Sixth Illinois Constitutional Convention. While determination of constitutional intent is not always bound by the same rules as common law instruments or statutes,<sup>7</sup> the same rules have often been applied in Illinois. For example, "the debates of the constitutional convention, held in 1869 and 1870, *aid* in determining the intent of the drafters of the instrument. . . . The true inquiry concerns the understanding of the meaning of its provisions by the *voters* who adopted it. . . . Still the practice of consulting the debates of the members of the convention . . . has long been indulged in by the courts in determining the *meaning of provisions which are thought to be doubtful*."<sup>8</sup> "The primary object of construction of the constitution or of a statute is to ascertain and give effect to the intent of the framers."<sup>9</sup>

The *Record of Proceedings* of the Sixth Illinois Constitutional Convention indicates that delegates intended to grant sweeping police power authority to home rule units. The intent of the Local Government Committee was expressed as follows in its report: "This broad grant of powers is subject to restrictions on income tax, local debt, and licensing for revenue. . . ." <sup>10</sup> It is significant that the constitution contains no limitations on the police power other than those which might be later proposed by the General Assembly.

<sup>6</sup> Eugene McQuillin, *Municipal Corporations*, 3d ed. rev. (Chicago: Callaghan and Co., 1966), vol. 2, sec. 4.112A. Emphasis added. See also *Houston v. State*, 142 Tex. 190, 176 S.W.2d 928.

<sup>7</sup> *In re Trapani's Estate*, 21 Ill. App. 2d 19, 157 N.E.2d 83 (1958).

<sup>8</sup> *People ex rel. Keenan v. McGuane*, 13 Ill. 2d 520, 527, 150 N.E.2d 168, 172 (1958). Emphasis added.

<sup>9</sup> 13 Ill. 2d at 532, 150 N.E.2d at 175.

<sup>10</sup> Illinois, Sixth Constitutional Convention, *Record of Proceedings, Committee Proposals-Member Proposals*, Committee on Local Government Proposal 1 (Springfield: 1972), VII:1601.

Intent is further elaborated in the Local Government Committee report in the following statement: "The intent of this draft . . . is to give broad powers to deal with local problems to local authorities. . . ."<sup>11</sup> The committee may have raised a question, however, concerning the authority of home rule units over land use control: "powers of home rule units relate to their own problems. . . . Their powers should not extend to such matters as divorce, *real property law*, trusts, contracts, etc. which are generally recognized as falling within the competence of state rather than local authorities."<sup>12</sup> Specifically referring to the police power grant, the committee stated, "no objections have been raised to vesting this basic 'police power' in the home-rule municipalities and counties."<sup>13</sup> The committee report further indicates that this grant of police power is similar to the Ohio grant referred to above.

The only modifying clause in the grant of home rule power is the limitation upon the exercise of power "pertaining to its [a home rule unit's] government and affairs." It can be logically reasoned that, since zoning was clearly known to be a matter of municipal concern and known to be a method of limiting property interest, delegates to the Illinois constitutional convention were fully cognizant of the impact of a general police power grant and intended to include land use control within its purview. Whether or not land use controls pertain to the government and affairs of municipalities exclusively is one of the major issues still to be settled by the courts in interpreting home rule in Illinois. It would appear from the evidence of broad intent and the lack of statutory mandate that the decisions should be affirmative.

#### **LIMITATION BY STATE ACT**

There is no question that the General Assembly "may deny or limit . . . any other power or function of a home rule unit. . . ."<sup>14</sup> by a three-fifths vote. An important question remains as to whether the General Assembly could, by simple majority, enact a mandatory uniform land use control act pursuant to subsection 6(h) of article VII: "The General Assembly may provide specifically by law for the exclusive exercise by the State of any power or function of a home rule unit. . . ." The very nature of land use controls, particularly the controversy surrounding exclusionary aspects and problems of standing, seems to require state exercise of authority.

Illinois has not reached an impasse on these issues since the authority of the state of Illinois to exercise its police power has been reserved in article II, section 2: "The enumeration in this Constitution of specified powers and functions shall not be construed as a limitation of powers of state govern-

<sup>11</sup> Ibid., VII:1622.

<sup>12</sup> Ibid., VII:1621. Emphasis added.

<sup>13</sup> Ibid., VII:1623.

<sup>14</sup> Art. VII, sec. 6(g).

ment.” Convention records indicate the intent of the delegates, in the words of delegate Louis J. Perona: “We do not intend that . . . the deletion of . . . powers means that the state government does not have them.”<sup>15</sup> In short, the state has the police power and may exercise it for any legitimate purpose which is found to be of paramount importance to the people of the state as a whole.

### IMPROVED PROCESS

It is the relationship between planning and zoning which may be able to provide the quality, specificity, and flexibility of guidance needed to improve the process of land use regulation. Through the control of location by type and density of land uses, a critical element of stability may be introduced into the planned provision of public facilities and services in the most effective and efficient manner. Without planning, zoning becomes an ad hoc and often unjustifiable infringement on private property rights. In most litigated zoning cases the key nonprocedural issue is deceptively simple: whether the zoning restrictions are reasonable or, stated another way, what the public interest is in restricting a particular piece of land in the manner prescribed. Comprehensive planning establishes the factual basis for determining the reasonableness of the particular zoning decision by publicly setting forth the objectives and the criteria on which decisions are based. Objectives which consider the interrelationships among economic, social, and physical factors are the context within which zoning decisions may be strengthened. The legal efficacy of a regulatory means of controlling public services was recently illustrated in the case of *Golden v. Planning Board of Town of Ramapo*.<sup>16</sup> This case established the relationship between planning and zoning in New York and relied in part on home rule authority.

### OBJECTIVES FOR HOME RULE ZONING PROCEDURES

Zoning and land use regulation can play vital roles in preserving what is good and in facilitating changes required for the public welfare. Establishment of sound regulations by home rule units might help to achieve the following objectives:

1. The use of zoning as an environmental and social as well as an economic planning tool.
2. The separation of the policy formulation function of city government from the administrative function, particularly as related to zoning.
3. The reduction of the time required to reach a final administrative decision.

<sup>15</sup> Ill., Sixth Const. Conv., *Record of Proceedings, Verbatim Transcripts*, V:3944.

<sup>16</sup> 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138 (1972).

4. The conduct of zoning in full view of the public and affected property owners.
5. The professionalization of personnel involved in zoning administration.
6. The clarification and standardization of the procedures and organizations involved in zoning administration.
7. The establishment of a monitoring and evaluation procedure.
8. The improvement of the status of municipal decisions which are subjected to judicial review.

The most critical decision which local elected officials must make in implementing these objectives is to separate policy formulation from administration. Illinois law on the delegation of authority has been favorable in zoning cases. In *Heft v. Zoning Board of Appeals of Peoria County*,<sup>17</sup> the delegation of authority to vary or modify ordinances where practical difficulties or particular hardship in carrying out the strict letter of the law was upheld as being a sufficient guide, particularly since a public hearing and finding of facts was required. In over 40 percent of Illinois municipalities final authority on zoning variations is already granted to the Zoning Board of Appeals, and thus not even a violation of tradition is involved.<sup>18</sup>

## CONCLUSION

From the point of view of a land use planner, the problems and potential of home rule governance are fraught with ambiguity. On the one hand, preoccupation with issues of internal reform will make home rule units in metropolitan areas especially vulnerable to externally-created problems of growth. On the other hand, municipalities are now provided with the necessary scope and flexibility to deal with some land use issues more effectively.

The first priority for home rule units dealing with problems of growth should be the development of internal organizational and procedural improvements to strengthen local decision-making processes. Land use regulation, a function capable of immediate responsiveness, is often the critical test of local decision making. Whether the many questions which remain are resolved in favor of local self-government depends not only upon the courts but more fundamentally upon how reasonably municipalities proceed with the exercise of their new legal maturity.

<sup>17</sup> 31 Ill. 2d 266, 201 N.E.2d 364 (1964).

<sup>18</sup> Illinois Zoning Laws Study Commission, *Zoning Problems: Supplementary Statistical Report for the Illinois Zoning Laws Study Commission*. Prepared by Clyde W. Forrest, David C. Lager, and Katharine A. Messinger, Bureau of Urban and Regional Planning Research, University of Illinois at Urbana-Champaign (1971), p. 44.

## THE CHICAGO HOME RULE COMMISSION: REPORT AND RECOMMENDATIONS

ALLEN HARTMAN

Culminating the work of one year, on December 4, 1972, the Chicago Home Rule Commission submitted its *Report and Recommendations* (also referred to as *Report* in this paper) to the mayor and city council. The *Report*, consisting of nine chapters containing 624 pages, is the commission's response to its mandate to investigate and study ways and means of implementing home rule powers delegated to the city of Chicago under the 1970 Illinois Constitution.<sup>1</sup> The work of this reestablished commission is perhaps best understood when viewed from the perspective of its recent antecedents.

One of the early milestones in efforts to establish a greater degree of self-government for the city of Chicago was the creation in 1952 of the Commission on City Expenditures, the "little Hoover committee." One of the recommendations of that commission was that the mayor and city council appoint a committee to determine the best method of obtaining a modern city charter and to draft such a charter.

In 1953 the Survey Committee for Home Rule and Charter Recommendations was appointed by the mayor. This temporary committee was charged with the responsibility of devising the most effective ways and means of securing a city charter and establishing the greatest possible measure of home rule. The committee recommended that a permanent Chicago Home

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<sup>1</sup> City of Chicago, *Journal of Council Proceedings*, July 28, 1971, pp. 943-44. The text of the ordinance follows. Brackets enclose the words and terms which were removed from the original ordinance, and italicized words denote language added to the original ordinance, for convenience in analyzing the differences in scope and content of the assignments presented to the 1953-54 and the 1972 home rule commissions. 21-54. A commission to be known as the Chicago Home Rule Commission, consisting of [fifteen] *sixteen* members to be appointed by the Mayor with the consent of the City Council, not more than four of whom shall be members of the City Council or city administration, is hereby created. Said Commission shall give consideration to possible changes in form and structure that may be *necessary or desirable by reason of the adoption of the 1970 Illinois Constitution* for the advancement and modernization of Chicago's government and investigate and make a thorough study of all possible ways and means of [securing] *implementing* the best measure of home rule for the government of Chicago and to submit its report thereon to the [City Council not later than September 30, 1954 so that the best conceived and soundest proposals relating thereto may be submitted to the Illinois General Assembly not later than at its 1955 regular session] *Mayor for submission to the City Council.*

Rule Commission be created to study which necessary and desirable home rule powers should be secured for the city, including possible changes in the form and structure of Chicago's government.

The Chicago Home Rule Commission was created on June 11, 1953; fifteen members were appointed and began work late that year. In outlining their conception of their assignment, commission members agreed that the body was not a charter commission, since it had no authorization to prepare legislation for that purpose; that it would recommend only those changes in city government possible within the existing mayor-city council pattern; that it would not consider the possibility of either overall metropolitan government or of integration of some of the local governmental units; that management studies were not appropriate to its assignment; that problems relating to the modernization and restructuring of the city's government and problems relating to home rule powers would be given equal attention; and that the commission would attempt to cast its recommendations in such form as might be implemented by the General Assembly and the city council without the need for any constitutional amendment.<sup>2</sup>

The work of the 1953-54 Chicago Home Rule Commission met with both success and failure. For example, the state legislature adopted an executive budget authorization, but did not provide for restructuring the city council.

The interest in home rule, although never entirely abated, was dramatically rekindled by the Sixth Illinois Constitutional Convention. Article VII, section 6, of the 1970 constitution contains the broadest language granting home rule status to municipalities to be found in any state constitution. Almost all the provisions of the 1970 Illinois Constitution became effective July 1, 1971. In that month, upon the recommendation of Mayor Richard J. Daley, the city council reactivated the dormant home rule commission, which had last reported in 1954. New members were appointed and approved and a staff was hired.<sup>3</sup>

<sup>2</sup> *Chicago's Government: Its Structural Modernization and Home Rule Problems* (Chicago: University of Chicago Press, 1954), pp. 6-7.

<sup>3</sup> The membership of the commission remained constant throughout its existence and was as follows:

Patrick L. O'Malley, Chairman  
Dr. Norman A. Parker, Vice-Chairman  
Alderman Michael A. Bilandic  
Charles F. Conlon  
Thomas H. Coulter  
Joseph Gordon  
John D. Gray  
Alderman Claude W. B. Holman

Alderman Thomas E. Keane  
Honorable Philip M. Klutznick  
William A. Lee  
Senator Cecil A. Partee  
Mrs. Carey B. Preston  
Sebastian Rivera  
Raymond Schoessling  
Alderman Jack I. Sperling

The members of the Chicago Home Rule Commission staff included the author of this paper as executive director; Madison L. Brown II, Thomas J. Davies, and Lee J. Schwartz as principal research associates; and Estella G. Krantz and Judith L. Landesman as executive secretaries.



The commission found that in light of the broad language contained in section 6(a) of article VII any attempt to create a charter for the city of Chicago would result in a dilution of home rule powers delegated to the city under the 1970 constitution. Furthermore, since home rule powers bestowed upon eligible municipalities by the 1970 constitution are largely self-executing, the creation of a charter would be redundant. People, circumstances, standards, and institutions are so subject to change in our modern, fast-moving society that such a charter would rapidly become obsolete.

In further analyzing its mandate and outlining its work program, the commission decided that questions relating to restructuring of government at the executive and legislative levels should be determined by the policy makers, rather than through an exhaustive institution-by-institution, agency-by-agency, department-by-department study for which the commission was neither equipped nor funded. Such studies are better pursued following a determination that change is indeed desirable. They are best conducted by urban government experts in appropriate management areas who have the necessary expertise and funds. The commission was persuaded that its deliberations should extend to the more serious questions underlying urban problems: it would not study city problems primarily from the standpoint of structural and functional integration or consolidation but rather would seek to identify substantive problems as they affect the well-being of the citizens as well as the government of Chicago. These substantive problems were placed into broad subject areas which were ultimately refined into eight separate areas, the bases of the eight chapters of the *Report and Recommendations* of the Chicago Home Rule Commission.<sup>4</sup> Short summaries of these chapters follow.

#### **INTERGOVERNMENTAL COOPERATION**

The commission believed that broadening and extending intergovernmental cooperation among independent public bodies and agencies with the city of Chicago and its neighboring communities was a key issue in the implementation of article VII, section 10, of the 1970 constitution. This section of the local government article broadens the horizons for far more extensive cooperation than had been possible in the past. The *Report* sought to provide appropriate background information on national trends in intergovernmental affairs, to describe some of Chicago's present intergovernmental activities, and to make recommendations for future directions for the city's intergovernmental involvements. Mutual aid pacts to respond to emergencies, federal and state grant-in-aid programs, service contracts between governments, and

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<sup>4</sup> *Chicago Home Rule Commission: Report and Recommendations* (Chicago: University of Illinois at Chicago Circle, 1972).



joint or multilateral undertakings by governmental units were given as examples of possible directions for the future.

#### **GOVERNMENT OPERATION AND STRUCTURE**

Government operation and organization were considered by the commission as essential subjects. Here local government can take advantage of new technologies, new relationships between citizens and government, and new governmental powers which might be exercised by home rule units. Among the areas of study were the changes that appear to be taking place within the city and the relationships between those changes and the growth of the suburbs. The commission concluded that it is essential for Chicago to attempt to stem the further exodus of the middle class, young marrieds, and working class ethnic groups from the city. The commission also found that revitalization of local government is necessary to enable the city to deal with modern urban problems.

New methods of administration and representation were identified. The commission recommended formalizing certain informal powers now exercised by the mayor to strengthen the office of the chief executive. Possible staff reorganization at the administrative level was considered. The functions of city departments and of autonomous, single-purpose districts were suggested for reexamination from the standpoints of possible economies, functional integration, and consolidation. Reevaluation of the system of representation in Chicago's legislative branch was also proposed for consideration by the corporate authorities. Strengthening legislative responsibilities and decentralizing present service activities were among the possible directions suggested.

#### **HEALTH**

The possibility of an expanded role for Chicago in the delivery of health care services, in contrast to the city's traditional role as regulator and overseer of health and sanitary practices, was included among the subjects for study in the *Report*. The possibility of restructuring municipal health agencies was also studied. Among the problems considered by the commission were the presently high and still rising costs of health care, fragmentation and lack of coordination in services and planning, poorly distributed and obsolete facilities, inadequate financing, shortages of personnel, and unsatisfactory care for the poor and near-poor. The commission reported on a basic reorientation now taking place away from treating acute illnesses alone and toward maintaining good health, on both the local and national levels.

Many key questions were raised concerning the city's present and potential roles as a provider, financier, regulator, and stimulator of health care services. The possibility that the city not be directly involved in providing medical care services at all was raised. Among the factors discussed in viewing the

city's future role in health matters were the degree of adequacy and constancy of long-term financial support and the administrative capacity of local government to deal with health problems.

## **HOUSING**

The commission considered housing within the city of Chicago to be an essential area in which home rule powers might be exercised. Strategies for the future were recommended. Consideration was given to restructuring and consolidating government agencies as a complement to the substantive housing program. The commission recognized that the supply of housing for citizens of Chicago has been the function mainly of the private market and the federal government, that many key factors affecting the maintenance and rate of development of housing have been beyond the city's control, and that actions in the housing field have been, for the most part, responses to federal and private market initiatives. The national administration has recently grown less enthusiastic about providing financial support for central city housing developments. These circumstances have brought the improvement of housing conditions in Chicago to a serious impasse.

The commission believed it essential for the welfare of Chicagoans that city government now take the initiative to help resolve the present predicament. Home rule and other powers may enable the city to undertake new activities that will be critical to the resolution of the housing problem. The most critical needs at this time are for the city to deal with housing matters on a comprehensive basis, to coordinate public and private efforts, and to devise more efficient means for utilizing local governmental resources.

Among the recommendations are those which suggest creating and maintaining housing environments that will enable the city to serve a large middle income population, as well as the low and upper income levels. The commission also recommended that housing situations be created that will encourage voluntary racial mixing and that a special effort be made to provide adequate housing for those who cannot compete in the housing market under normal circumstances.

## **PERSONNEL ADMINISTRATION**

The city of Chicago, one of the largest employers in the entire country, has been forced to operate for many years under an archaic civil service law, and the commission concluded that municipal personnel administration should be of great concern. Among the most important elements of the modern personnel management program recommended by the commission is the creation of a Department of Personnel containing both a strong city personnel board and an office of personnel administration, with the two units operating in close liaison. The personnel board would serve as a guardian

agency to protect merit principles, approve rules and regulations, and hear appeals on employee grievances and discipline. A personnel director would be appointed the head of the office of personnel administration; he would have the authority to broaden, deepen, and execute a modern personnel program. The commission suggested expanding the present exempt service with respect to administrative, technical, and professional personnel, with provisions to enter exempt service from the career service and to return to the career service.

The creation of an executive career service open to top-level professional, administrative, and technical personnel was also recommended. Among the elements of such an executive career service might be special noncompetitive methods of entering the service, flexible assignments with rotation in the interest of the service, compensation arrangements that permit timely pay adjustments for meritorious performance, and practical methods of removing and reassigning officials without embarrassment or recrimination.

## **LICENSING**

Licensing has direct and indirect effects upon large numbers of Chicago's citizens; contained within its scope are broad areas of regulation affecting day-to-day activities. Thus, licensing was considered an important area for the commission's deliberation. Until home rule went into effect in 1971, all Illinois municipalities operated under Dillon's Rule. Because of sometimes inconsistent (and occasionally illogical) legislative classifications, municipalities had been unable to generate comprehensive licensing programs based upon the needs of their communities. The courts, looking more for technical fulfillment of the delegation of powers than for adherence to the substance of the law under challenge, have not often been helpful in this regard.

The new constitution appears to have granted the necessary flexibility and authority to home rule municipalities. The city of Chicago may now consider regulation and licensing on a much broader conceptual scale and on a deeper, more comprehensive basis than was previously permissible. The commission believed that an in-depth review of the functions relating to the issuance, suspension, and revocation of licenses and permits will also be required in order to avoid unnecessary and undesirable diffusion of authority and responsibility. The result will be fairer and more efficient administration of this important municipal power.

## **INCURRING MUNICIPAL DEBT**

The need for greater flexibility in financing municipal programs through the issuance of municipal debt obligations was considered important by the commission. The incurring of municipal debt could be modernized and considerably improved. The commission recommended consideration of four

methods for use in incurring long-term debt: the issuance of full faith and credit general obligations of the city payable from any and all tax receipts and other revenues; special revenue obligations payable from the receipts of special taxes or revenue sources other than the property tax; obligations payable from receipts of municipal enterprises; and double-barrel obligations of the city that are revenue or special revenue obligations with a backup pledge of the city's full faith and credit. The four methods of short-term debt issuance recommended for consideration by the city were general obligation notes or certificates, short-term secured and guaranteed notes or certificates, tax anticipation warrants, and bond anticipation notes.

## REVENUE

The commission determined that one of the key areas upon which the success or failure of all municipal programs would depend was that of municipal finance and revenue. In its *Report*, the commission attempted to present a comprehensive and technical compendium of revenue resources that may be available to Chicago corporate authorities in exercising home rule powers. The *Report* suggests ways and means for establishing reasonable, practical, and equitable revenue programs. The aims of these programs are to redistribute the present tax burden by lowering the demand upon property taxes and to impose replacement taxes or new taxes to distribute the cost of government more equitably than has been the case in the past.

Not all types of taxes were considered. Rather, the commission concerned itself with possible major sources of revenue in a tax program that is both administratively feasible and at the same time convenient for the taxpayer. The program is intended to produce the fewest possible adverse economic consequences but also provide incentives to work, save, and live in Chicago in order to stabilize and supplement the city's tax base. Additional goals are to help attract new industries and businesses, increase employment, and expand the city's purchasing power.

## CONCLUSION

The *Report and Recommendations* of the Chicago Home Rule Commission suggested that the commission's work be construed solely as a threshold study. Many recommendations will require further and more intensive research by experts in management, government structure, and other fields. Nevertheless, the commission concluded that with this beginning study the preliminary ways of implementing home rule have been identified. It was not anticipated that all recommendations could, or even should, be implemented at once, but rather that a number of years would be required for implementation.

In conclusion, the commission viewed home rule not as a panacea for

all the problems of modern society, but as an important tool for use in solving many of the most difficult problems of local self-government. The great potential of the far-reaching home rule powers delegated by the 1970 Illinois Constitution must also be viewed as carrying with it increased responsibility for local authorities. Local authorities must exercise their new powers thoughtfully, reasonably, equitably, and judiciously. The good sense shown by home rule units in using their authority to solve real problems pertaining to their government and affairs will justify the confidence in local government shown at the constitutional convention and confirmed by the electorate in adopting the constitution by popular referendum.

## **CITY POWER AND THE FEDERAL SYSTEM: HOME RULE IN CONTEXT**

EDWARD M. LEVIN, JR.

How much should we expect from home rule? Because it changes the way the local government game is played, some municipal officials and hopeful citizens and political scientists may confuse the rules of the game with its purpose, and strive to discover in Illinois's new constitutional provisions a mystic formula for achieving "instant Preamble." It would be a blessing indeed if municipal home rule, one of the basic innovations of the 1970 Illinois Constitution, could help our cities "provide for the health, safety and welfare of the people;...eliminate poverty and inequality; [and] assure legal, social and economic justice."<sup>1</sup> Unfortunately, nothing written in the new constitution is likely to affect the reality of urban problems — of decay, deprivation, segregation, crime, sprawl, and pollution. Whatever solutions there may be to these problems will be found largely outside of legal concepts of state constitutions and judicial interpretations of municipal power.

The struggle of local officials to apply home rule powers to current conditions will provide eventful days in Illinois's city halls and county courthouses. But it is the events which are taking place in the national and state capitals — involving clashes between conflicting political philosophies and priorities — which will set the limits on the development of effective urban programs. Only with an understanding of these events can local officials consider how the exercise of home rule powers may best complement the strengths and offset the weaknesses of federal and state programs. Home rule can have the greatest meaning for those communities whose leaders appreciate the considerable extent to which external forces impinge on local problem solving.

In a time when cities were perceived as wealthy and independent, the notion of governmental autonomy had strong attraction. How degrading it must have been for city officials to be told that no matter how self-sufficient their city might be, under Dillon's Rule it had to get permission from the

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<sup>1</sup> Preamble, 1970 Illinois Constitution. Occasional references in this paper to "cities," "city halls," and "mayors" should be interpreted as including other municipal and county units, headquarters, and officials as appropriate.



state to regulate its affairs. Home rule in those circumstances would have been comparable to a coming of age, a manumission. That is not the situation today. However great the promise of home rule to California in 1879, to Minnesota in 1896, to Ohio in 1912, what it meant then to Los Angeles, St. Paul, or Toledo cannot now mean much to Chicago, East St. Louis, or Peoria.

Today, cities are not self-sufficient. They are often unable to render effective local service without financial assistance from federal and state programs. The public expects areawide urban cooperation and concern by local government for social issues. These are expectations which often depend upon the carrots and sticks of federal and state programs. The trends of new programs, and the accompanying variations of public sentiment, provide the context in which the meaning of Illinois home rule will be formed.

### THE NATIONAL SHIFT TO "LOCAL RESPONSIBILITY"

Some of the recent expressions of national commitment to a New Federalism appear wholly consistent with the home rule philosophy of city power. There is a strong assertion that local responsibility for urban problems should be encouraged. President Nixon's proposals are a startling departure from the heyday of federal categorical grant programs under President Lyndon Johnson's Great Society. While those programs brought a great increase in federal funds for urban needs, they often brought as well a bewildering increase in federal forms, guidelines, and bureaucrats.<sup>2</sup> The substitution of general revenue sharing and special revenue sharing for scores of human development and community development programs seems to offer mayors as well as governors considerable discretion in the expenditure of federal dollars.<sup>3</sup> In his 1971 State of the Union Message, President Nixon expressed his rationale for revenue sharing this way:

The fact is that we have made the federal government so strong it grows muscle-bound and the states and localities so weak they approach impotence.

If we put more power in more places, we can make the government more creative in more places. . . .

Local government is the government closest to the *people*, it is most responsive to the individual *person*. It is people's government in a far more intimate way than the government in Washington can ever be.<sup>4</sup>

<sup>2</sup> The complicated record of federal aid for urban areas through the 1960s is documented in John M. DeGrove, "Help or Hindrance to State Action? The National Government," in Alan K. Campbell, ed., *The States and the Urban Crisis* (Englewood Cliffs, N.J.: Prentice-Hall, 1970), p. 139.

<sup>3</sup> General revenue sharing is the reallocation of federal tax dollars to states and local governments with no strings (except for minimal requirements such as publication of fund use and compliance with Davis-Bacon Act wage rates). Special revenue sharing is restricted to specific substantive purposes with or without strings and may require prior federal review of its intended uses. In the latter form, it is occasionally referred to as "block grants."

<sup>4</sup> Emphasis the president's.



A first step in the transformation of federal categorical aid programs into locally-administered revenue-sharing programs came in the adoption of the five-year, \$30 billion General Revenue Sharing Act of 1972.<sup>5</sup> Presidential efforts to accelerate the process may be seen in the budget message for the 1973-74 fiscal year (fiscal 1974), which called for the sharp curtailment of scores of categorical programs, with the implicit threat that revenue sharing is the only device through which Congress may expect to appropriate federal dollars for urban social programs. Even if Congress should be inclined to blunt these presidential initiatives — and if so inclined, successful — the future direction of federal aid seems clearly away from the assumptions underlying categorical programs of the 1960s.

There is further evidence of the president's commitment to strengthened mayoral authority in a number of formal and informal policy changes in the administration of the programs which revenue sharing is proposed to replace. Planned variations to existing model cities programs authorized the mayors of some twenty cities much leeway (and some extra money) in expanding the scope of projects from model neighborhoods to city-wide operations. Further, in planned-variation cities the mayor is given formal authority to review and comment on the allocation and use of federal grants affecting the city even under programs administered through noncity grantees.<sup>6</sup>

There is increased respect for the interests of municipal officials even under programs which specifically involve consideration of nongovernmental or extraterritorial interests.<sup>7</sup> In the administration of federally-assisted projects which require citizen participation, community groups are reminded that ultimate authority rests with city hall. Recommendations of areawide planning organizations which conflict with the proposals of applicant local agencies are often ignored. My own experience is that in recent years federal bureaucrats have increasingly assumed that they are expected to resolve any programmatic differences they might have with local officials and that, if push comes to shove, the White House may intervene on the side of the city.

#### **MATTERS BEYOND LOCAL CAPACITY — REGIONAL CONCERNS**

However strong cities may grow in regulatory authority, wealth, and national recognition, serious urban problems which are not susceptible to mu-

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<sup>5</sup> Fiscal Assistance to State and Local Governments Act, Pub. L. 92-512, first session, 1973. Special revenue-sharing proposals have been less successful. See footnotes 14 and 22.

<sup>6</sup> See HUD memorandum, "Procedures for Implementing and Operating Planned Variations," July 29, 1971; issuance, "Interdepartmental Federal Policy and Informational Guide on Chief Executive Review and Comment, Planned Variations Demonstration, Issued under the Auspices of the Under Secretaries Group," December 11, 1972.

<sup>7</sup> The conclusions of this paragraph, while necessarily subjective, reflect the clear consensus of participants and observers at all levels of program operations.

nicipal solution persist.<sup>8</sup> One of the areas of greatest concern is the resolution of metropolitan issues.

Each day's newspaper brings fresh evidence of the apparent irreconcilability of interests in a metropolitan region. Wherever there is a city with suburbs, there are conflicting priorities and incompatible goals. One community's park is the anticipated right-of-way for another community's access highway. One village's industrial tax base furnishes the pollution which destroys the residential values of a neighboring village. Even where the interests of several communities coincide — as in the control of flood plain development, the preservation of a sprawling hardwood forest, or the provision of adequate low- and moderate-income housing for present residents — each community faces the dilemma of risking a disproportionate burden if it acts alone. The result is often action by none, to the detriment of all.

Occasionally, metropolitan problems transcend even state boundaries and confront the entire federal system with a challenge of frustrating complexity. Air and water pollution control in the Chicago-Gary area and development of adequate transportation facilities in the St. Louis-East St. Louis region are typical of a whole host of problems treatable, if at all, only on an interstate, metropolitan-wide basis.

Everywhere throughout urbanized areas there is the need for a process of orderly decision making, for metropolitan planning, so that each of those who must allocate capital resources for essential services — for water, highways, sewage and solid waste disposal, drainage, recreational facilities, schools, hospitals — may at least operate with the knowledge of what the others hope to accomplish. Perceptions of needs and solutions change over time; effective metropolitan planning must be not the production of a static document but the dynamic process of accommodating growth. If Illinois is to enjoy the benefits of sound metropolitan planning and decision making, an urban perspective which goes beyond municipal boundaries is imperative.

#### **MATTERS BEYOND LOCAL CAPACITY — CITIZEN INVOLVEMENT**

Within large cities another problem is apparent. Every large city is composed of neighborhoods and communities whose residents at times feel as remote from the decision-making process of a city council as do cities from the actions of Congress or the state legislature. The same arguments used to justify revenue sharing or home rule could as well be addressed to the need for neighborhood government, or at least for more citizen participation in local programs which particularly affect a subcity area. After all, each of Chicago's fifty wards has more than twice the number of people

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<sup>8</sup> This paper acknowledges but does not discuss the enormous importance of national priorities and of the national economy (matters beyond state and often, seemingly, federal control).

required for automatic municipal home rule status under the Illinois Constitution.

Many urban ills undoubtedly can be traced to the lack of identification which individual citizens feel with the workings of government at all levels — federal, state, and local. Formal efforts to improve communication between government and citizens might not reduce crime or improve housing maintenance (although neither possibility is farfetched), but such efforts could surely mollify the broad public distrust of conventional governmental structures. This distrust has been manifested in the allure of Alinsky's self-help, confrontation-style community organizations, in the strength of support received by political candidates who espouse populist views, and in stiff voter resistance to tax increases. Unchecked, such cynicism may find expression in less socially acceptable forms, starting perhaps with tax revolts and widespread voter apathy.

Nothing in the president's New Federalism, or in the local government article of the Illinois Constitution, precludes city efforts to improve communications with its citizens, to develop increased resident participation in the development and execution of city programs, or to experiment with decentralized functions to be performed by nascent neighborhood governments. Although they would require changes in the present structure of local government, these activities are not beyond the technical capacity of municipalities. In the absence of a federal or state requirement, however, there is little cause to expect the larger cities — where changes would make the most difference — to initiate such innovations.

#### CONTINUING FEDERAL INTERVENTION

Home rule units in Illinois would be among the principal beneficiaries of all forms of revenue sharing. This is not, of course, because of home rule, but because the sharing formulas favor the larger cities and counties. While federal aid may represent only a small portion of a city's total budget,<sup>9</sup> it often constitutes the bulk of a city's discretionary funding authority, that is, that part of the budget not irrevocably committed to salaries, debt, and essential services. A determination of the applicability of federal statutes which

<sup>9</sup> An official, in-depth study concluded that federal assistance contributed less than 10 percent of governmental funds available in a community. *Intergovernmental Assistance: A Federally Sourced Budget for the City and County of San Francisco, Fiscal Year 1968* (Washington, D.C.: Bureau of the Budget, September 1969). A more recent study of one county indicated that in fiscal 1970 the federal government was the source of approximately 15 percent of governmental spending on local functions (exclusive of the postal service and of income support payments). Loans and grants constituted less than half of the federal share, while direct federal spending made up the rest. Scott Keyes, "The Public Sector in Champaign County, Illinois," *Illinois Business Review* 29, no. 11 (December 1972), p. 6.

set conditions for the use of federal assistance, and of the procedures required to demonstrate compliance, will materially affect the actual extent of local authority and responsibility.

If all the federal categorical grant programs which revenue sharing is intended to replace were to vanish overnight, taking with them their requirements for "maximum feasible citizen participation," for "workable programs for community improvement," for "comprehensive health plans," there would remain a considerable body of federal law restricting a community's use of federal aid funds.

Title VI of the Civil Rights Act of 1964 and Title VIII of the Civil Rights Act of 1968 respectively prohibit denial of equal benefits from the use of aid funds on account of race or other improper discrimination and require affirmative furtherance of fair housing in the federal administration of any assistance program.<sup>10</sup>

The National Environmental Policy Act prescribes the preparation of a detailed statement of environmental impact before approval of federally-assisted projects which would significantly affect the quality of the human environment.<sup>11</sup>

The Uniform Relocation Assistance Act of 1970 requires adequate local efforts to provide relocation payments and services to persons displaced by federally-assisted governmental action.<sup>12</sup>

The Intergovernmental Cooperation Act of 1968 authorizes the president's Office of Management and Budget to monitor "Circular A-95" reviews, through which state and substate regional agencies act as clearinghouses to review and comment upon the suitability of applications for a broad array of federal aid programs.<sup>13</sup>

Just because a law is on the books does not, of course, assure that it will be applied uniformly or to the letter. The statutory conditions noted above and those in other federal legislation are susceptible to varying interpretations as to their applicability to revenue-sharing programs and as to the strictness with which they are to be applied. In this unprecedented situation of one set of laws (revenue sharing) offering considerable discretion, while other laws appear to limit this discretion sharply, much depends upon how bureaucrats and judges view the new rules of the game. The rules have not yet been made, but special interests will undoubtedly assert their version of

<sup>10</sup> Pub. L. no. 88-352, 78 Stat. 241, 42 U.S.C. 2000a (1964); Pub. L. no. 90-284, 82 Stat. 73-92, 18 U.S.C. 245 (1968) (codified in scattered sections of 18, 25, 28, 42 U.S.C.).

<sup>11</sup> Pub. L. no. 91-190, sec. 102(2)(c), 83 Stat. 853, 42 U.S.C. sec. 4332(2)(c) (1970).

<sup>12</sup> Pub. L. no. 91-646, 89 Stat. 1894 (1970) (codified in scattered sections of 42, 49 U.S.C.).

<sup>13</sup> Pub. L. no. 90-577, 82 Stat. 1098 (1968) (codified in scattered sections of 40, 42 U.S.C.); Office of Management and Budget, Circular A-95.

the congressional mandate. This assures some period of doubt — if not of strict statutory compliance — on the part of local officials.

While general revenue sharing has no strings, at least at the federal level, there will presumably be some strings attached to the special revenue-sharing programs. Bills introduced in this session and the last session of Congress (none of which have been passed at this writing) all contain requirements for some kind of federal review of local plans.<sup>14</sup> The final form of these measures will indicate a great deal about the continuing role which the federal government may be expected to play in controlling the allocation of resources by local government.

The federal government's continuing local assistance programs, unaffected by the proposed shift to revenue sharing, have their own additional prerequisites. For instance, the Urban Mass Transportation Act of 1964, under which the president proposes that \$1 billion be appropriated for the 1974 fiscal year, provides that transit grants can be made only for transportation systems included in a comprehensive plan for the urban area.<sup>15</sup> In turn, Comprehensive Planning Assistance grants to state, city, and metropolitan agencies, authorized under section 701 of the Housing Act of 1954, and budgeted at \$110 million for fiscal 1974 (an unusual increase of 10 percent over fiscal 1973 levels), are conditioned upon the designation of a formal mechanism to involve citizens directly in the planning process.<sup>16</sup>

New federal assistance programs for statewide land use control and related functions may be expected to involve additional planning requirements on an unprecedented scale. We can only guess at the full impact of a proposed National Land Use Policy Act,<sup>17</sup> as superimposed on the provisions of the Coastal Zone Management Act of 1972<sup>18</sup> and of the Federal Water Pollution Control Act Amendment of 1972.<sup>19</sup> It is too early to predict the

<sup>14</sup> Principally S. 3248 (The [proposed] Housing and Urban Development Act of 1972), 92d Cong.; S. 1743, H.R. 7277 (The [proposed] Better Communities Act), and S. 1744, all now pending in Congress. It is noteworthy that in 1970 Congressman Reuss, Democrat of Wisconsin, proposed that revenue sharing be conditioned upon state and local reforms, specifically including the provision of constitutional home rule. See Henry J. Reuss, *Revenue Sharing: Crutch or Catalyst for State and Local Governments?* (New York: Praeger, 1970), p. 126; H.R. 11764, 91st Cong.

<sup>15</sup> Pub. L. 88-365, sec. 4, 78 Stat. 304, 49 U.S.C. 1603(a) (1964).

<sup>16</sup> Pub. L. 560, 83d Cong., 68 Stat. 640, 40 U.S.C. sec. 461 (1954); HUD Handbook CPM 6041.1A, ch. 4, sec. 5, Mar. 1972. It may be significant, however, that the administration's proposed Responsive Governments Act would replace the present comprehensive planning assistance program with one that no longer requires citizen participation.

<sup>17</sup> See, for example, S. 632 and H.R. 7211, 92d Cong.; S. 268, H.R. 10294, proposed land use bills pending in Congress.

<sup>18</sup> Pub. L. 92-583, 86 Stat. 1280, 16 U.S.C., secs. 1451-64 (1972). "Coastal" areas include areas along the Great Lakes.

<sup>19</sup> Pub. L. 92-500, 86 Stat. 816 (1972) (codified in scattered sections of 12, 15, 31, 33 U.S.C.).



precise effects of these acts, but taken together they will certainly require *states* to require *local* governments and quasi-governments (metropolitan agencies and substate districts) to establish comprehensive, continually adaptive land use policies, with accompanying priorities for public investment and limits on private development.

#### THE FUNCTION OF GRANT CONDITIONS

The congressional purpose in attaching strings to grant programs is evident. Responding to a national constituency, Congress acts to assure that what it interprets as a matter of national priority is adhered to by recipient agencies. Put another way, if Congress is spending the money on behalf of all the nation's taxpayers, then Congress wants to be certain it is buying, on behalf of those taxpayers, the most urgently needed goods and services. These are presumably commodities which might not be furnished by the grantees of federal assistance if they were simply given the funds and left to their own devices.

The inherent conflict of this process is often overlooked or misunderstood. By definition, grantees of categorical aid are expected to chafe under a program's restrictions, sometimes as to what is required to be done with the money, and sometimes as to what else has to be done to get it. If there were no disparity between the requirements of the law and the inclinations of the grantees, there would be no need for the program; revenue sharing without strings would be adequate. Only where disagreement may be expected is there a rationale for imposing programmatic requirements. By and large, categorical grant programs have been remarkably successful in "buying" local actions desired by Congress. Slums have been cleared, transit systems planned, and housing and neighborhood centers built which — for better or worse — would probably not have happened under revenue sharing. The cities have become used to the system, strings and all, and have grown dependent upon the program dollars. This was exemplified in the mayoral outcry after the president announced the termination of the once-reviled Community Action Program of the Office of Economic Opportunity.<sup>20</sup>

Local compliance with federal program conditions is not always reluctant. A requirement that appears fair on its face and that is fairly and uniformly administered is occasionally the excuse which allows responsible local officials to do that which they know should be done, but which would be politically hazardous in the absence of apparent federal coercion. This has often been the case in federal housing and urban development programs, with bitter-

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<sup>20</sup> See, for example, Charles Bartlett, "[Chicago Mayor Richard Daley] Firm Friend of Poverty Program," *Chicago Sun-Times*, Feb. 12, 1973. For a practical consideration of what ought to go into the administration of federal aid programs, see Francis D. Fisher, "The Carrot and the Stick," *Harvard Journal on Legislation* 6 (May 1969):401.

sweet requirements calling for the elimination of restrictive building code standards, the adoption of open occupancy ordinances, or cooperation with metropolitan housing development programs. Repeatedly, communities have undertaken planning, relocation, citizen involvement, and equal opportunity actions in not-so-grudging compliance with federal requirements.

#### **EXPANDED STATE RESPONSIBILITY**

If New Federalism represents the withdrawal of federal efforts to monitor local performance, state government will have at least a limited opportunity to fill the gap. Without revising its tax structure or attempting to restrict local powers, a state such as Illinois could condition the redistribution of the state share of federal general revenue-sharing funds upon certain local actions. In so doing, the state need not adopt cumbersome categorical aid programs of its own. The state could offer revenue sharing carrots through formula grants to communities participating in areawide planning and implementation, or in active equal opportunity programs, or in whatever is considered of high priority to the state.<sup>21</sup> This would, of course, be a departure from the precedent set in allocating to cities and counties on a per capita basis, with no strings attached, a portion of the Illinois state income tax.

A state may find further opportunities to influence local operations in federal special revenue-sharing legislation.<sup>22</sup> If state governments are given broad discretion in the distribution of package grants within the state, the power of the state bureaucracy could rival that now attributed to federal agencies. This would be particularly true if federally funded, state-approved community development and housing grants are offered as substitutes for the current urban programs. If a state such as Illinois chooses to intervene more directly in urban problem solving—with additional state funds, a restructured property tax system, new state land use controls, an aggressive housing policy, or the like—there is no limit to its potential impact on local government.

#### **THE ROLE OF HOME RULE**

What, then, is the place of home rule in this complex federal system? How much should we expect? In their account of how urban issues were treated at the Sixth Illinois Constitutional Convention, Thomas R. Kitsos

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<sup>21</sup> As a complementary measure, the legislature has the option of revising the formula according to which local governments receive their portion of federal general revenue-sharing funds. Pub. L. 92-512, sec. 108(c), first session, 1973.

<sup>22</sup> Early comments on the president's proposed Better Communities Act emphasize that this form of special revenue sharing would give governors new control over spending. See, for example, Tom Littlewood, "Nixon Proposal Would Shift U.S. Aid Away from Mayor," *Chicago Sun-Times*, April 20, 1973; and John L. Moore, "Administration's Community Development Plan Is Revised," *National Journal* 5 (June 2, 1973):797.



and Joseph P. Pisciotte described how the home rule provision altered the relationship between the state and its home rule units: "Whether this change in relationship will result in the solution of urban problems is open to question. However, one immediate ramification will be the elimination of an excuse for inaction on the part of public officials in home rule cities and counties. No longer will these officials be able to shift the blame to 'that non-responsive legislature'."<sup>23</sup>

The elimination of the excuse may prove to be the real value of home rule. Any recent observer of cities would conclude that a fresh look at their problems and at the function of urban government is in order. A new constitutional framework provides Illinois cities with an appropriate opportunity to take that fresh look. Even if it should turn out that home rule offers no new answers to urban problems, a new approach to these problems may reveal a useful role for traditional programs, for new federal or state programs, or for the innovative use of intergovernmental cooperation, specifically authorized by the 1970 constitution.

In exercising their home rule authority, Illinois municipalities will not be restrained by the limitations found in other states. Writing the year before the Illinois convention, Frank Grad observed, "It has long been clear that home rule powers are not what they seem. Because home rule powers are generally couched in fairly absolute terms, and because states frequently wish to legislate in areas that affect municipalities, they create a legislative no-man's land where the municipality is uncertain of its power to act and the state is unwilling to assume the burden."<sup>24</sup> The Illinois Constitution's statement of liberal construction is clearly intended to spare home rule units this dilemma.

It is less clear whether Illinois home rule cities will be able to transcend the parochialism implied by the constitutional delegation of authority. Calling for increased federal involvement in urban problems, the late Charles Abrams in 1965 anticipated much of the urban legislation of the late 1960s. He charged that "under the cloak of home rule and local autonomy, the state has passed down much of its own sovereign responsibilities to a myriad of local (mostly suburban) governments, each of which is concerned with its own welfare to the exclusion of its neighbors."<sup>25</sup>

The ability and willingness of cities to broaden their concerns are the

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<sup>23</sup> Thomas R. Kitsos and Joseph P. Pisciotte, "Con-Con and the Urban Crisis: A Note on Some Related Constitutional Changes," in Michael A. Murray, ed., *The States and the Urban Crisis* (Urbana: Institute of Government and Public Affairs, University of Illinois, 1971), pp. 71, 78.

<sup>24</sup> Frank P. Grad, "The State's Capacity to Respond to Urban Problems: The State Constitution," in Campbell, *The States and the Urban Crisis*, p. 44.

<sup>25</sup> Charles Abrams, *The City Is the Frontier* (New York: Harper and Row, 1965), p. 211.

great unknown qualities of Illinois home rule. Without adequate financial resources, no government can do much to ameliorate or innovate. But with whatever resources are available, Illinois cities will have an unprecedented opportunity to demonstrate their responsibility by allocating funds wisely. Together, home rule and revenue sharing provide that opportunity.

Floyd Hyde, HUD Assistant Secretary for Community Development, himself a former mayor (of Fresno, California), spoke last year to local officials in San Antonio about the meaning of revenue sharing. His comments are equally appropriate in considering the meaning of home rule.

To make these revenue-sharing packages work, there are burdens which you must assume with your new decision-making powers. First, I suggest you should encourage full citizen involvement in setting your priorities and in designing and implementing solutions to your problems. An informed and involved citizenry is one of the surest ways to guarantee that the most pressing needs are being met and that the proposed solutions are designed to be acceptable for the future. A great deal of effort will be required to do this — to involve people of all interests in your community — but the rewards can be well worth the effort.

Second, you cannot think . . . only in terms of the city's geographic boundaries. You are part of a metropolitan area located in the second largest state in our nation, which state also is part of a multistate region. In addition, you are the gateway to Mexico for many items of trade. What happens in San Antonio has a very real effect on these larger areas. As you plan for the utilization of your revenue-sharing funds, it is in your best interest to communicate with and work cooperatively with all jurisdictions in your metropolitan area and your larger community of interest. Time and effort devoted to this today can help eliminate problems which may otherwise arise in the future.<sup>26</sup>

Just as revenue sharing challenges cities to rediscover and develop their own programs freed from the constraint of rigid federal guidelines, municipal home rule challenges cities to rediscover and exercise their powers freed from the constraint of Dillon's Rule. If the reality of city power is something less than is implied in these challenges, the opportunity for effective local action remains.

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<sup>26</sup> Speech (San Antonio, Texas) July 17, 1972. Mr. Hyde was subsequently appointed undersecretary of HUD.



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*SPEECHES*

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## THE NEED FOR POSITIVE LEADERSHIP

NORMAN ELKIN

The question of home rule, as one astute public figure remarked, is really a question of the distribution of power. In that context, I think what impressed me most observing the recent state constitutional convention was the fact that people who have power sure hate to give it up. I observed a standard scenario at the convention, a sort of litany of how people who have power talk about those who want it. The litany is always the same. I call it the universal put-down. Those who argued against home rule privately or otherwise would always cite, in crescendo fashion, three reasons for not giving local officials power. First, they would start with insinuations that "those people down there" really are not competent. "They're not ready" — i.e., they're not ready for home rule in Chicago, certainly not in Carbondale. If the incompetency argument didn't grab you they would step up the pace a little and imply that local officials, as opposed to state officials, are somewhat less honest, insinuating that local officials would rob you blind. And if the corruption issue didn't grab you, they would look at you and try to figure out whether you were a liberal or a conservative. If they thought you were a liberal, they would imply that the locals were really a bunch of "rednecks" and reactionaries. Conversely, if they thought you were a conservative, they would imply that the locals were irresponsible radicals foaming at the mouth.

It's a funny thing. Wherever I went I kept hearing the same story. For example, after the constitution was adopted, I went to a meeting of the committee on implementation of the constitution, which Sam Gove chaired. To that meeting came some elected county officer — I don't remember whether he represented the clerks, treasurers, or auditors — and he was arguing against giving *county boards* power to govern because (1) county boards are incompetent ("They're not like us, that's why they don't get elected to be county clerks, or auditors."); (2) on top of that they're not fiscally responsible (dishonest?); and (3) on top of that, they're not as progressive as we are when it comes to government (the ideological argument). Again, when federal revenue sharing came up in Congress one senator, probably reflecting the view of many others, based his opposition to revenue

sharing on the grounds that "those people" in the state legislatures and in the court houses were generally reactionary, undeserving, and by implication dishonest and corrupt.

I used to hear the same thing in many city halls in the country when local officials, at least privately, spoke about neighborhood groups and the efforts to achieve community control through such vehicles as community action programs: "Those people out in the neighborhood don't know what responsibility is; they need to be educated first. They're not ready and if you gave them a chance they would probably turn dishonest. And on top of that some of them are radicals."

That is the litany of the universal put-down. The moral is that the other side is *never ready* to share power.

Given that kind of mentality I think the achievement of home rule in Illinois is something that we can be proud of. Furthermore, Illinois home rule is unique in that it has built into it certain safeguards against a reversion to the pre-1970 pattern of state-local relationships, or perhaps I should say the pre-1970 condition of local dependency. The most critical safeguard, although it is in a sense a time bomb, is the preemption clause. In an address to the Ohio Constitutional Revision Commission in November 1971, I stated my explanation of what gave rise to the need for the preemption clause, as I saw it. I quote from that speech:

The real problem in implementing home rule is not one of theoretical definitions but rather how to create an operational situation which will *prevent* the state legislature or a judge from arbitrarily taking home rule away. . . . The problem was how to make the legislature pause . . . long enough to realize that it was now dealing with a new situation.

Now, it just so happens that at the time the constitution was written the partisan and factional divisions in both houses of the legislature made it almost impossible for the legislature to frivolously emasculate home rule. The danger now is that demographic changes and political volatility will change the factional and partisan lineups in such a way as to jeopardize this "stand off" between the pro- and anti-home rule interests. I would assume that such a change certainly will happen before the end of this decade. And therefore I want to quote another part of that speech which I made in Columbus, Ohio, eighteen months ago:

In this context it is vitally important to understand that the real effect of this change [the 60 percent preemption provision] is to *buy time*. Everybody needs time to adjust to the new situation. It's going to take a few years until everybody learns how to play it under the new rules and how to govern, including the city of Chicago.

We are buying time, we are racing time against the legislative clock. As I read the background paper prepared by Mr. Green it is obvious that many factions in the General Assembly are rather anxious to undo the home rule



provisions of the constitution. And they can do it, quite properly, if they can get 60 percent majorities in both houses.

Looking back over the two years that we've now been living with the new constitution, I am happy to say that the dire predictions of doom made by the home rule opponents haven't happened — we're healthy and happy. But what disturbs me is that I haven't seen the emergence of any political or institutional leadership in Illinois to move forward with the thrust of the new constitution. There has been no concerted effort to significantly implement the provisions of the new constitution. Let me give you a couple of examples.

First, let's talk about local debt. I was sitting with my friend Jack Beatty at a meeting which he was hosting not too long ago. It was a meeting of the board of directors of the Civic Federation. Jack asked for an expression of policy on a pending bill which would slap a referendum requirement on all home rule units on debt above the percentage which is now protected by the constitution. I made three arguments against that action. I said it was premature. After all, I knew of no unit that had used up its constitutionally protected debt. Everybody was still below what they could bond without a referendum. What was the hurry? Secondly, I said that referenda weren't the only way to control public spending. After all, on most bond issue referenda you're lucky if you get 35 percent of the people to turn out. You're dealing with a technique that hasn't really been that effective except when people have really been aroused over taxes or some specific issue. As a general control on fiscal management the referendum is an obsolete mechanism. The third argument I made is that we should wait until there is evidence of the abuse that so many anti-home rule people feared, and then let's see if we can get some local solutions. The whole idea of home rule is to put the monkey on the back of the guy who is taking the action.

Anyhow, I lost the argument and ended up casting the sole negative vote. What bothered me was that I remembered talking to people during and after the convention about the question of the regulation of local debt under the new constitution. Many informed and sincere people felt that there was going to have to be some legislation to control local government debt. The question that ran through our minds then was: Why doesn't the Municipal League, or the city of Chicago, or some other interested party sit down and think out a system of controls that wouldn't handicap and hamstring local governments the way the old constitution did: make it a liberal, flexible system and then introduce appropriate legislation to implement it? Nobody did their homework. So what happens? An organization like the Civic Federation, with a knee-jerk reaction, votes to support legislation to slap referenda back on *all* nonconstitutionally protected nonrefer-

endum local debt and we're off to the races, back to 1870. I hope the bill doesn't pass, but it may. And if it does pass, city officials and county officials and those civic and professional organizations that presume to watch over, love, and protect local governments will be to blame. They haven't done "their own thing" to create positive legislation to protect the new philosophy of state-local relations.

Let's take another example of a failure to act quickly to implement the new constitution: *differential taxation*. A lot of people worked hard to incorporate the power of differential taxation for local units into the new constitution. The main reasons were to give counties sufficient powers to provide services in new growth areas, at least on a temporary basis, to prevent premature municipal incorporations, and to alleviate the need to create special districts. The Commission on Urban Area Government's studies showed that an average of forty special districts a year were created in Illinois during the 1960s to meet demands for urban services. Of the 149 new municipalities that had been incorporated in Illinois in the previous fifty years, only one qualified for home rule under the 25,000 population standard: the planned community of Park Forest. The average town incorporated in those fifty years had, as of 1969, between 4,000 and 5,000 people. Having incorporated the power of differential taxation into the new constitution to deal with the problem of urban services in such areas, the convention required that there be implementing procedures for its use. Our commission recommended a bill, which was introduced, dealing with only a minor portion of the use of differential taxation. That bill had to do with how counties could respond to the growth of population in unincorporated areas. It did not deal with how counties might use differential taxation to provide special services in incorporated areas, and it did nothing about the cities using the powers of differential taxation within their own jurisdictions. We did work with some of the city people, however, and tried to encourage them to formulate a companion bill dealing with municipal use of this power. Anyhow, our bill passed the House by something like 123-3, or 123-2. It died in the Senate, for what reason I do not know. The point is that nobody was ready in 1971 to act on implementing this provision in the constitution which potentially broadens the powers of cities and counties immeasurably. The apparent theory that seemed to prevail in many municipal circles at that time was that the best position to take on preservation of home rule powers was to take a protective position. Anything that local officials had any doubts about seemed to evoke a negative response, and in case of doubt it was deemed better to vote *against* something than to take a chance and vote for it. In this vacuum Oak Park took the bull by the horns and by ordinance adopted a differential taxation measure. That was knocked out by the courts. The courts said there must be implementing legislation.

So here we had a key power aimed at enabling local governments to provide special services where need existed, and nobody took the time to create the legislation and the leadership to make the exercise of this home rule power possible.

Now I made a prediction about differential taxation in that same speech to the Ohio Constitutional Revision Commission that I cited earlier. I said as far as cities are concerned I doubt whether many cities will use the power of differential taxation very often. This is for the obvious reason that differential taxation is a very dangerous power: it can be used to favor the well-to-do and to discriminate against the less well-to-do areas. It reminds me always of when I first started working as a consultant in downstate Illinois. I was appalled by the fact that whenever I walked into the better neighborhoods there were always paved streets, sidewalks, and street lights, but when I went into the poor neighborhoods — often they were black neighborhoods — there were dirt roads, no curbs, no sidewalks, no street lights, and a lot of water lying around in backyards from the rain. I used to ask people, “Why don’t these areas have basic public facilities?” And I was usually told that public facilities “down here” were financed by special assessments. Apparently (so the local officials reasoned) the blacks and the poor folks generally didn’t want the facilities. Otherwise, why hadn’t they asked for them! Obviously the better-to-do folk must have asked to be assessed because they always seemed to get the streets and sidewalks. I have since been convinced that fiscal vehicles like special assessments — and to me differential taxation is conceptually very close to special assessments — can be very useful in helping the well-to-do areas but that they are not very often too helpful for the little guy. After all, there is no point in taxing the poor; they don’t have the tax base. So I say one must use the power of differential taxation with care lest it become a means of economic discrimination.

On the other hand, in my opinion differential taxation could be very significant for the long-term survival of the city, for one reason if nothing else. It is my personal belief that in the years to come we will witness a much more sincere and comprehensive political commitment to the revitalization of the central areas of our large cities. I don’t think that I am wrong in this. The “downtown” projects of the past will pale in comparison to the kind of effort that we are going to see in the future. I predict this even though we are witnessing the withdrawal of federal assistance for inner city redevelopment: there has been virtually no funding of downtown projects for a number of years now. Significantly, however, a number of states — California and Minnesota particularly — are now providing local systems for revenue financing of downtown rebuilding projects based on

future increments in downtown taxable values. Differential taxation, which is a much more viable fiscal vehicle than what Minnesota and California have, can be a way to finance the rebuilding of the inner cities. As a matter of fact, if we had had this constitution five years earlier we would not have had to go through the charade in Chicago of creating an urban transportation district in the downtown area to finance our "EI" removal and subway extension program. Differential taxation is indeed a significant tool, and the city of Chicago could make good use of this power. Frankly, I don't know why legislation to effectuate the use of this power hasn't been enacted. But this is another example of what I find disturbing — a lack of institutional response to the opportunities that the new constitution offers.

Let us take the County Executive Act as another example of the lack of institutional response to an opportunity. The Commission on Urban Area Government recommended a bill for the county executive. It was adopted by both houses and signed into law in December 1971. That was quite a surprise. Nine counties actually had referenda based on it only 120 days or so after it became law. All lost, unfortunately, but considering the lack of time for preparing for the referenda, that wasn't too bad. Now I want to tell you how the commission's bill on the county executive form of government, which is the "trigger" provision in the new constitution for giving counties home rule, came to be law. We had assumed that the various associations of county officials and all the other people concerned with the subject — township officials, legislators, and others — would be introducing bills by the dozens to implement the new powers for counties. We felt this way because there was so much discussion at the constitutional convention on the need to modernize and strengthen county government, particularly in the urban counties. Ron Johnson, who was my assistant, started to tell me all the diverse ideas that were being discussed. Some people really favored a sort of county manager concept — a business manager — when they talked about county executives. Others viewed the county executive as a sort of county mayor — a ceremonial figure. Still others viewed the county executive as a combined political and executive figure, much like the president of the United States. There were a lot of differences that people had as to what the county executive really meant and what county home rule was all about. So my assistant said to me: "Let's have an ideal bill drawn up and while it might never pass it should really set forth what a county executive *ought to be* — all the powers — really lay it on them — veto powers, chairman of the board, chief executive officer, item veto, and so forth." And so a bill was written to be put into the legislative hopper simply as a *yardstick* to which the warring parties could refer in accommodating to each other's differences, simply as something that people could repair to just to keep the legislative dialogue moving. That bill was introduced and it turned out

to be the *only* county home rule bill in the legislature. Nobody else introduced any. And it passed.

Let's move to something that's a little bit more current, the CTA. Here's an interesting example of what disturbs me. Many people will probably disagree with my comments and they are entitled to do that. What I am disturbed about here is that when the first major crisis on a local service occurs since the adoption of the new constitution we find local people running to Springfield just like pre-1970 saying "Give us money, we can't carry the load." Now how do you expect the legislators from downstate to support the concept of local home rule if the cities come with their hats out whenever they get into financial trouble? Perhaps this is a perspective that not many people share. I understand the conditions surrounding the CTA and why city officials might take a totally different perspective. For example, I can understand that the city might say, "Well look, the CTA serves other areas than the city, why should we alone bail it out?" That's a good point and I accept it. Another valid point the city might make is that this emergency aid is only the beginning of a permanent subsidy and I can see why a city would be hesitant to step in and become the permanent subsidizer. Look what happened to New York City: transportation subsidies almost made that city bankrupt. The point is that regardless of the reasons why a city might want to go to the legislature for aid, the fact is that when it does, the impact of that action has to be assessed in terms of the pre-1970 tradition in the state of Illinois, essentially an anti-home rule tradition. It seems to me, knowing how long this CTA crisis was brewing — and it has been brewing since it was formed because the very nature of the legislation creating it doomed it — there should have been a more comprehensive approach. I would have liked to see a concept that went something like this: We, Chicago and Cook County, will support local transportation and other local services. In return for supporting specific local services with local resources we want the state to give cities a larger share of the income tax revenues as a measure of general financial support. I don't know what the localities now get from the income tax — 8.5 or 12 percent. Whatever it is, it seems to me, and it has always seemed to me, that this is a very miserly portion. Frank Kirk may disagree, but I've always felt that the cities should get a much more substantial portion of the state income tax. In the context of home rule, what I would have envisioned is a situation where the cities throughout the state would have said: "Let's accept the present Illinois system of income tax distributions as a form of revenue sharing and let's expand it. The state ought to give us a bigger share, thereby creating a floor under local services, and we in Chicago, Decatur, or wherever will bear the responsibility to make sure that local services continue, whether it be transportation, public health, or whatever."

The shucking off of specific local functions to higher levels of authority is, in my opinion, counter to home rule and I predict that you're going to see many cases where village and city officials transfer functions *to* special districts rather than take them away *from* special districts. Many of them don't want the responsibility of self-government. My own town has just transferred its recreation functions to the park district. There is a behavior pattern evolving here which is disturbing. In a sense it shows that we're not responding, not taking advantage of the opportunity to make the home rule concept meaningful in positive terms of self-government.

We have to button down these things about home rule that have to be buttoned down now, not later on when it is too late. We have several major gaps in the structure of home rule. I want to get to them because they were the fundamentals that were discussed at the constitutional convention and then dropped, or dealt with in light fashion. The three problems that were not dealt with significantly are the problems of *viability*, *regionalism*, and *urban growth*. By viability I mean the question of who should have home rule. After all, there has to be some relationship between the right to rule and the capacity to govern. The convention ended up saying that any town with over 25,000 population was qualified to exercise home rule powers. There is no magic in the 25,000 figure. It could have been 10,000 population. Some wanted 15,000, while others wanted a 100,000 population standard. Anyhow, out of all the discussion three standards of viability were ordained: (1) 25,000 population automatically gives a municipality home rule; (2) a municipality can elect to have home rule if it votes for it; and (3) as far as counties are concerned, all they need do is adopt a structural reform — adopt a county executive form of government, without any reference to size. These are the only standards that we have for home rule eligibility.

The viability of local government is a serious issue because under the present circumstances we are increasing population in the United States at the rate of 3 million a year. We need effective institutions to govern this expanded, mobile population. There is a question whether we can afford to neglect one of the most valuable resources we have, and that is government itself. I think if anything came out of my experience with the Commission on Urban Area Government it was the philosophy that government is a resource and that it too must be developed, just as one talks about developing land or developing health services. The structure of government, the capacity and personality of government, is in itself a resource that is important to the maintenance of our standard of living. And our standard of living at the present time is slipping, including meatless days, energy crises, and who knows what next. This is a significant issue that has not been dealt with and that has to be dealt with.

We achieved a certain amount of notoriety during the Con-Con period



when we pointed out that on a per 1,000 population basis we had more governmental units than dentists in Illinois, a figure intended to show how ludicrous the situation had become. We have an average of nine units of local government laid on every taxpayer in the urban sections of Illinois. We tried (and when I say "we" I mean the commission that I was associated with) to help in this area by developing a bill called the Local Government Boundary Adjustment Act. It would have provided some mechanisms for facilitating mergers, exacting higher standards for new incorporations, and expediting annexations and consolidations. That bill unfortunately did not pass but something needs to be done about the proliferation of inadequate minigovernments. We have the semicomical situation where towns with as few as 1,500 or 1,200 persons have joined the ranks of home rule cities by referendum. We welcome them aboard but I don't look to them to change the course of history.

A second gap that hasn't been dealt with is the problem of regionalism. The CTA crisis is a perfect example of the vacuum that exists in this area. Let's grant that transportation is a regional problem. Our commission advocated extending the principle of home rule to metropolitan services. We advanced this concept because we sincerely felt that the issue most likely to undermine home rule in the big cities will be a failure to come to grips with the problem of regional services. When you talk about cities like Chicago, New York, Los Angeles, or Detroit you're talking about crises in metropolitan services and if you don't solve them you're going to end up with center cities that, from a decision-making standpoint, are increasingly irrelevant. We advocated and I would advocate for your consideration again tonight that the principle of home rule be extended to the question of metropolitan government. Bear in mind that since 1870 in the state of Illinois local governments almost universally have been created by the people, usually by referendum. With very rare exceptions for bodies like metropolitan exposition centers and public building commissions, all governmental bodies, be they cities, villages, park districts, you name it, are derived from popular demand. If governments created by the people are good enough to fight fire and mosquitoes, they should be good enough to respond to problems of transportation and other regional needs.

I am afraid that some of the present thinking about creating a regional transportation authority by statute will further rigidify some of the worst forms of our local governmental structure. For example, there is talk of a six-county regional transportation district based on the property tax. How ironic! The whole country is trying to reform the property tax and here we're talking about creating a new regional unit to levy a new property tax. The whole country is crying for responsiveness in government, for better relationships between people and their officials and here again we're talking



about creating an appointive board. We've heard that such a board should have two, or three, or six members — all appointed by two distant officials, the governor and the mayor. Well, that's what the CTA is all about. So here we're talking about extending the same pre-home rule concept of government with all of its structural inadequacies. I think we need to take another tack and expand the concept of home rule, push its frontiers out a little and apply it on a metropolitan scale.

The third and last serious gap in the area of local government is the problem of urban growth. The commission's research pointed out that since the end of World War II about a third of all the housing units in the state of Illinois were built in unincorporated areas. Many of these areas have subsequently been incorporated. That's where the new growth is, outside the cities and outside the suburbs where the land is still available. There's where people are moving and many of the problems that both the suburbs and the central cities face are due to the growth and movement of population.

We operate in a vacuum in Illinois as far as urban growth is concerned. There is no institutional structure for dealing with the problem of new growth on the fringe of metropolitan areas to the satisfaction of the interests of the metropolitan area as a whole. I would submit for your consideration two thoughts. One is the need to develop a fiscal system where the public wealth of the community is distributed equitably. The best example I know is the course adopted in Minnesota for the seven-county Minneapolis-St. Paul metropolitan area. (We, by the way, slipped their concept in modified form into one of the commission bills.) The concept they have in Minnesota is as follows: 40 percent of the annual increment in taxable values generated by nonresidential growth — that is, by industrial and commercial construction in the metropolitan area — is taken off the top by the state and placed in a regional account. It is then redistributed to all the cities and suburbs in the metropolitan area on a per capita basis with some qualification based on the level of wealth and/or poverty in an area. In other words, there is a slightly higher apportionment for the poorer areas. Now what this does is make sure that if there is a regional shopping center, or an industrial park, in one part of the metropolitan area, everybody in the metropolitan area benefits fiscally; the city benefits from some of the wealth being created in the suburbs and the suburbs benefit from some of the wealth being created in the city. Now I believe there is a bill in the Illinois legislature to draw a five- or six-mile radius around regional shopping centers and let all the towns within that radius get a portion of the sales tax generated by the centers. In the North Shore area the Northeastern Illinois Planning Commission is working with three communities — Northbrook, Northfield, and Glenview — on a joint planning effort which includes an agreement to distribute, in some way, certain commercial tax benefits that might come in

that area. Well, I think that these are good beginnings. I think the system that they have in Minnesota is far superior, however, because it brings *everybody*, the whole region, in, not just two or three neighboring communities. Many of our problems of school finance would disappear if we had a system like Minnesota's. It is ludicrous to say that communities like Chicago — and when I say Chicago I mean the total metropolitan area — or the Minneapolis metropolitan area cannot afford good schools. These are two of the richest communities in the country. The problem is that often the school children aren't where the tax base is, and the tax base isn't where the children go to school. This creates serious fiscal disparities. I think that the Minnesota concept could ultimately bring the problem of fiscal inequities in school support and other basic services under control.

The second fiscal direction I think we ought to consider as a means of coping with new growth and the rejuvenation of the old cities is some kind of central banking system for *governments*, a system whereby all governments — federal, state, and local — may borrow from a capital pool for long-term loans for major improvements. It is particularly needed for small towns. Going back to Frank Kirk, I was impressed by the fact that it was harder for a town like Carbondale to get the first \$5 million for their sewage treatment plant than it is for a city the size of Chicago to get a \$150 million bond issue for school expansion. It's hard when you're small. We need something for funding capital improvements for cities and towns, large and small, that is a little bit more intelligent and rational than our current system of fragmented debt financing.

The last thought I would leave with you is that we need, at least as a beginning, some kind of organization of collective effort in this whole area of local home rule, state-local relations, and intergovernmental relations. A year ago we urged (and a bill was introduced in the Illinois House calling for) the creation of a "little ACIR" modeled after the federal Advisory Commission on Intergovernmental Relations. The intent was to create a watchdog organization sanctioned by the state legislature and composed of prestigious members who could educate public officials as well as the general public, provide information for the legislature, innovate, think ahead, and recommend those things that are necessary to make the whole area of state-local relationships work and work well. This, at least, is the minimum effort that we need.



## SOME REFLECTIONS ON HOME RULE

EDWARD M. KRESKY

The difficult task of equating central authority with the worthwhile desire of retaining local control over local affairs is an issue which will never be satisfactorily and totally resolved. And that, of course, is why the home rule debate retains the interest it does. The issue itself is as old as man's desire to better order his life by constructing an organized framework within which he and his family might safely prosper yet still control their own destinies. It is a problem that is probably prehistoric in its origins.

Our civilization's oldest and most continuous administrative organization, and one of its most successful, has, of course, been the Roman Catholic Church, headquartered in Rome and administered today through dioceses on every continent of the world. The church has an enviable record in balancing central authority while stimulating diversity within a strong unity. The recent ecumenical councils, in a way constitutional conventions, were successful and significant efforts by the church to adjust the necessary balances between central authority and the local powers exercised by a bishop and his priests within an individual diocese.

Nearly two hundred years ago the American founding fathers attempted to deal with a somewhat similar issue in establishing, out of thirteen sovereign states, a new national sovereignty. A division of powers between states and federal government was established by the Constitution, and the system has responded with a fair degree of success to the new demands of new ages. The current attempts to create a New Federalism, after the winding down of the Vietnam War, represent the latest in a continuing series of adaptations of the federal system.

In municipal home rule we find an issue whose historical roots can be traced back many years but whose current origins can be found primarily in the growth of cities in America. Toward the end of the nineteenth century, with large cities springing up in many of the states, we found the need for an additional governmental and constitutional overlay within the traditional federal-state system. The new cities were calling out for special attention to their special problems of urbanization. They wanted the power to deal with their own problems. They appeared to have the necessary resources to solve these problems by themselves if they had the necessary legal power

to deal with them. Remote, rurally dominated state legislatures were not prepared to meet this issue, nor were they politically interested in dealing with it. At that time the Congress and the presidency were even more remote than governor and legislature from the problems of the cities.

Out of these circumstances came the movement for home rule for the nation's growing cities. Beginning with St. Louis in the 1870s, cities began to secure from their state constitutions special recognition and special powers to deal with their own special problems. The attack on Dillon's Rule had begun. The movement spread, so that by the first part of the twentieth century more than half the states had enacted constitutional provisions that either limited the legislature in dealing with the cities or required the legislature to devolve upon the cities powers to act with respect to their own property, affairs, and government. This traditional approach to constitutional home rule usually grants authority, through the constitution, to a locality to adopt and amend a charter and to pass ordinances on matters relating to its affairs. Often enabling statutes are enacted enumerating the powers that the local governments may exercise. The power to enact laws of state-wide concern is retained by the legislature. This approach attempts to separate matters of local concern from those of state concern. This has proven to be a difficult thing to do and has resulted in judicial interpretations that have, in the main, severely limited the actual home rule powers of local governments.

A new approach to home rule began to receive increasingly serious consideration after the Second World War. Leaders in this new approach were Jefferson Fordham, dean of the University of Pennsylvania Law School, the American Municipal Association, such students of state-local relations as John Bebout, and others. The new approach attempts to reverse completely the traditional constitutional position regarding the powers of local governments, particularly cities and counties. This approach would permit a home rule local government to exercise any power not specifically denied it by general law or by its own charter. This, of course, is basically the approach of your new Illinois constitutional provision.

Alaska adopted this form of home rule for its constitution. A New York State commission on which I served recommended in the early sixties the abandonment of the traditional New York home rule provisions for this new look, and although the concept was highly regarded, it was not accepted. It is both important and encouraging that a major state like Illinois, embracing as it does a great and complex metropolitan area, has adopted this new form.

This change is encouraging for many reasons. It will give us an opportunity to see whether the reversal of presumption regarding the powers of a home rule locality will, in fact, produce a more harmonious relationship

between the central government and the home rule locality. Further, it will demonstrate whether this new approach may better stimulate local government to attempt to meet its own local problems and solve them, a position advocates of the new approach to home rule have always taken. Certainly, the new awareness of local government powers in Illinois — evidenced by this assembly — should make a better climate for improved local government service delivery and performance.

In my own judgment, in the final analysis effective home rule will come more as a result of legislative attitudes rather than from constitutional formulas. This does not mean that constitutional provisions are of small import. They are not. They are the foundation upon which state-local relations are based. But, moving from a legal framework to the operating realities of government, the role of the legislature becomes increasingly crucial. Under the traditional formula of home rule, the home rule powers of local governments were systematically whittled away with the aid of narrow judicial construction and interpretation. The very same thing can happen under the new approach to home rule. One must always be prepared for the pressure of general legislation preempting for the legislature powers that constitutionally could and perhaps should have remained with the home rule locality.

If a legislature is of a mind to see to it that a large amount of power should devolve upon the home rule localities, it can easily provide for such devolvement, whatever system of home rule is being used. If, on the other hand, and this is more often the case, the legislature chooses to restrict home rule powers, it will find the legal and political means to do so, regardless of the constitutional home rule provisions. Thus, to me, a crucial issue is, Should the governor and legislature have such power over the fate of local governments? Years back, I thought this to be poor policy. Today I am not so sure.

Many of the really fundamental problems facing the individual local governments in this nation are problems that far outstrip the political boundaries, the economic powers, and the realizable political jurisdictions of an individual local government. Solutions to our modern urban-age problems, so metropolitan in character, will not be found within the confines of classical home rule. Nor, might I add, will they often be found by a series of home rule communities acting voluntarily on the basis of legally permissible intergovernmental cooperation.

My New York experience in intergovernmental activities may be of pertinence and interest. In the years 1955 to 1970, almost every legal barrier for intergovernmental cooperation had been lifted in New York State. Did this produce any significant progress in either urban planning or urban action through intergovernmental cooperation? I am afraid I have to report that

the answer is no. Municipalities banded together and formed a Metropolitan Regional Council, which quickly became a talk show and was forgotten. Today in all-to-many metropolitan areas elsewhere in the nation, COGs — Councils of Government — have fallen upon similar fates.

On the other hand, without necessarily embracing the wisdom of their policies, state-created, region-wide special purpose authorities and agencies have not only planned, but they have done. Whether they be large and powerful organizations like the Port Authority of New York and New Jersey, whether they be new organizations like the Urban Development Corporation in New York, or whether they be organizations like the new regional transportation structures being formed increasingly throughout the country, they have one thing in common: they do. The reasons for their impact may be traced back to such matters as finance, legal powers, and other kinds of clout that stem from state government initiative. If these agencies on occasion have poor policy direction, I would not put the blame on them. Rather I would put the blame on governors and legislatures as the ultimate policy directors.

I was quite impressed with the background papers prepared for this Illinois Assembly on Home Rule. One of Edward Levin's comments in his paper deserves special attention. He said: "Unfortunately, nothing written in the new constitution is likely to affect the reality of urban problems — of decay, deprivation, segregation, crime, sprawl, and pollution. Whatever solutions there may be to these problems will be found largely outside of legal concepts of state constitutions and judicial interpretations of municipal power."

I believe that the answers to the metropolitan problem can best be found through full use of the sometimes difficult and always diverse system of American federalism. *All* levels of government must play active roles. Home rule makes sense only if it enhances the initiative and abilities of local government to handle *its share* in finding solutions to the major domestic problems that threaten to overwhelm this nation.

The federal government must provide coherent national policy and funds. It need not provide armies of bureaucrats nor special congressional preserves of power and influence. Obviously, I favor revenue sharing and I also favor properly funded special revenue sharing in such substantive areas as community development, education, and health services. I am not enthusiastic about direct federal activity whether it be in the south Bronx, south Chicago, or south Georgia. Too often there has been a willingness on the part of federal officials to wield great power but not to assume corresponding responsibility when the urban action gets hot.

The metropolitan ball game should increasingly be played at the state level if we are going to have more effective delivery of governmental services



and so make a dent in the problems that have beleaguered our cities and now are beginning to do the same to our suburbs. Governors and legislatures must begin to provide not only policy and funds, just as the federal government must do, but increasingly the states may be forced to begin providing metropolitan services through direct state activities.

We see the beginnings of this, as I have indicated, in the transportation field. As to community development, the New York Urban Development Corporation may very well be the wave of some distant future. Superior financial strength and breadth of political and legal jurisdiction make state government well suited to tackle certain wide-ranging, expensive domestic problems that are metropolitan- or region-wide in character.

As to our local governments: at the state house level, understanding and sympathetic implementation of constitutional home rule will better equip local governments to deal with genuinely local problems. It will also help permit localities to play a constructive role with the higher levels of government in dealing with metropolitan problems. We can no longer expect even great cities to deal exclusively with the variety of urban issues that seem to bear little relation to political boundaries.

County home rule will be of help in strengthening county government. Unfortunately, with some notable exceptions the traditional approach of county government to most urban-age problems has been languid. Theoretically, counties can and should do more than they have. In actuality, the record is a slim one, but there is some potential for improvement. The new Illinois constitutional provisions for county home rule should stimulate counties to play a more vigorous and responsible role in our governmental system.

If these comments appear to downgrade the role of local governments, I would have to deny this. I would hope that local governments would attempt to discharge fewer responsibilities, but discharge the ones they have assumed more effectively. It would be better for a community if the local government collected its garbage properly under a state-sponsored regional solid waste disposal program than to try to do the whole job itself and make a terrible mess of it.

As to the future, I would hope to see a system of effective federalism coming into being where home rule would contribute toward the effective discharge by local government of its portion of a multiple responsibility. Let us take, for example, the broad area of community development — or rather, more importantly, of community development and redevelopment. The federal government — president and Congress — in concert, not in strife, would lay down the broad ground rules for the effort. The federal government would provide the tax incentives and the tax deterrents to encourage development. It would also provide, through such a medium as a well-funded program of special revenue sharing, direct federal funds to help

the state and local bodies make a reality of national and community policy goals.

The state governments would have to assume a more pivotable role. They could establish regional community development agencies with broad powers to act, to build, to rebuild — yes, even to use a bulldozer from time to time. These agencies would be armed with federal and state funds, the backing and authority of governor and legislature, and they would be clearly charged with the primary responsibility for orderly community development designed to improve the sagging quality of living in our urban areas.

Local government, reorganized and strengthened through home rule charter reform, would provide a sure continuity of local services to spur community development. Police and fire protection, schools, sewerage and garbage collection, and all the other vital local services, will have to be performed effectively if community redevelopment is to come to pass. The local government must also serve an important function as the conduit transmitting community aspirations to the regional development agency.

For my part, in such a system zoning powers should be lodged in the state-led regional body, and I realize how much “heat” is contained in that suggestion. But, if zoning remains in local hands, I would hope that in return for federal and state dollars and commitment localities would provide the necessary cooperation in zoning to help make balanced regional community development a reality.

In conclusion, I offer this set of remarks neither as a wild-eyed advocate of home rule nor as a detractor. I am for home rule if it will strengthen local government in our overall system of government, but, if it creates more conflicts than it solves, then by definition home rule is not functioning properly. At this point in our history there is really only one overriding consideration. What will help our ailing cities, and that next group of patients to be admitted to the emergency ward — our older suburbs? I don’t think home rule, by itself, can provide the basic answers to dilemmas of this urban age, but I am for home rule because I know it can help.

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